TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 12

JOSEPH EDWARD MORISSETTE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 6, 1951.

CERTIORARI GRANTED MAY 7, 1951.

SUPREME COURT OF THE UNITED STATES

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[fol. a] UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH EDWARD MORISSETTE, Defendant and Appellant,

vs.

UNITED STATES OF AMERICA, Plaintiff and Appellee

Criminal No. 4469

Appeal from the District Court of the United States for the Eastern District of Michigan, Northern Division

[fol. 1] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

(Vio. Sec. 641—Title 18)

(Theft of Government Property)

Date	Proceedings
1949	
May 12.	Indictment filed.
May 12.	Property bond in amount of $500.00 filed.
May 16.	Defendant arraigned, stood mute, plea of not guilty entered—released on personal recognizance to await trial.
May 19.	Transcript of court reporter filed.
May 20.	Acknowledgement of copy of indictment by Atty. Transue.
May 27.	Appearance of Andrew J. Transue of Flint, Michigan, as attorney for defendant filed.
June 4.	Order in re photographs filed and entered.
June 13.	Trial by jurors begins.
June 14.	Trial continued and verdict of guilty returned.
June 14.	Defendant sentenced to custody of the Attorney General of the United States for a period of two months or a fine of $200.00—fine to be paid within 15 days and court costs to be paid.
June 14.	Judgment and sentence filed and entered.
June 15.	Defendant's request to charge filed.

June 24. Petition and order continuing bond of defendant filed and entered.

June 24. Notice of appeal, filed.

June 24. Copy of notice of appeal with docket entries forwarded to U. S. Circuit Court of Appeals for the Sixth Circuit.

Aug. 1. Opinion of court and order denying motion for new trial filed and entered.

Aug. 20. Transcript of court reporter in re proceedings as of June 13th and 14th, 1949, filed.

Sept. 1. Transcript of court report of proceedings as of June 14, 1949 filed.

Dec. 27. Court stenographer's transcript of proceed-s as of June 13 and 14, 1949, filed by Attorney Transue.

[fol. 2]

Date	Proceedings

1950

Feb. 3. Order from circuit court of appeals dismissing appeal for want of prosecution unless reinstated within 30 days from February 1, 1950, filed.

Feb. 8. Certified copy of order from Appellate Court granting defendant 45 days from February 6, 1950 to complete and file record.

Feb. 20. Additions and corrections to proposed record on appeal of testimony taken and court proceedings filed by U. S. Attorney.

Mar. 4. Order in re exhibits.

Mar. 6. Stipulation as to contents of the record filed.

Mar. 6. Stipulation waiving comparison of the record filed.

[fol. 3] UNITED STATES OF AMERICA IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

Criminal No. 4469

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH EDWARD MORISSETTE, Defendant

INDICTMENT—Filed May 12, 1949

(Sec. 641, U. S. C., Title 18)

(Theft of Government Property)

The Grand Jury charges:

That on or about the 2nd day of December, A. D., 1948, at Oscoda, Michigan, in the Eastern District of Michigan, Northern Division, Joseph Edward Morissette, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United [fol. 4] States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18.

A true bill.

Alfred Grueber, Foreman.

Edward T. Kane, United States Attorney, by Janet E. Kinnane, Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

ORDER—Entered May 16, 1949

Said defendant being present in open Court with Andrew Transue, his attorney, and being duly arraigned on the indictment heretofor filed against him, waives reading thereof and stands mute, thereupon the Court ordered a plea of not guilty entered, and said defendant is released upon his existing bond to appear for trial later.

Frank A. Picard, United States District Judge.

[fol. 5] IN UNITED STATES DISTRICT COURT

ORDER—June 6, 1949

A motion having been made at the time that the above named respondent, Joseph Edward Morissette, was arraigned before this Court on the indictment in the above cause to permit pictures to be taken on the Oscoda Air Force Base, Michigan, of the location and approach to certain old and used bomb casings remaining there, that being the location from which the respondent is accused of stealing old bomb casings, property of the United States of America, it having been represented to the Court that the taking of such pictures are material in the respondent's defense, and the Court being fully advised in the premises,

On motion of Andrew J. Transue, of Transue & Hood, the attorneys for the above named respondent, it is ordered that the Command Officer of Oscoda Air Force Base, Michigan, permit pictures of the approach to the old bomb casings remaining on said Air Force Base and the remains of said old bomb casings remaining there to be taken by the respondent, his attorneys, or photographers brought there by them for the purpose of taking such pictures.

(S.) Frank A. Picard, Judge of the District Court of the United States of America.

Approved as to form:

(S.) Janet E. Kinnane, Asst. U. S. Attorney.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

Transcript of Proceedings and Evidence

Proceedings had in the above entitled cause, before the Honorable Frank A. Picard, District Judge, and a Jury, at Bay City, Michigan, on June 13, and 14, 1949.

(The jury retires from the Courtroom).

Mr. Transue: May it please the court, the respondent moves to quash the indictment for the reason that it is

charged in parts in the words of the statute while it does not charge a felonious intent.

The Court: Have you read the law?

Mr. Transue: I have read the law.

The Court: What is it? Read it.

Mr. Transue: Title 18, Section 641.

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;"

Insofar as this is applicable, that is the part.

The Court: What do you say it lacks?

Mr. Transue: It does not charge a felonious intent.

The Court: I tell you what I will do, I will go ahead and hold it in abeyance for the time being, and if the government doesn't produce any authority tomorrow morning the case will be dismissed. Call in the jury.

Leo Edward May, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Leo Edward May. I live at Oscoda, Michigan. I am seventeen years of age. I have seen bomb casings. I have seen bomb casings other than on the bombing range. [fol. 7] I saw them on a red Studebaker truck at the junction of M-171 and U. S. 23. It was called to my attention as it was a red Studebaker truck like ours; and second in the scrap drive for the Chamber of Commerce and Agriculture we tried to get them and couldn't get them. I wondered why anybody else could get them when we couldn't get them for our scrap drive. The truck was not moving when I saw it. The truck was parked off the side of the road to stop, talking to a man. It was stopped there and he was talking to a man, I just saw him. He stopped and talked. I was on the school bus, going home. I went home and told my father.

Cross-examination.

By Mr. Transue:

This was in broad daylight. The truck was heading toward Oscoda. That is toward Bay City too. It was a stake body truck and the casings lay out there in plain view.

Myron May, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Myron May. I am employed at the Army Air Base at Oscoda. I live there too. Leo May is my son. He made a report to me about seeing some used bomb casings. After I received this information I went up to the post and talked to Captain Askelson the next morning.

Q. And to your knowledge have any of these used bomb casing--been allowed to be removed?

Mr. Transue: I object to that, it is not material.

The Court: He may answer as to his knowledge. As a matter of fact I think the only one that can do that is the War Assets Surplus Corporation.

Mr. Transue: I object to it.

[fol. 8] The Court: His knowledge—what he knows. Do you know whether or not they have been released?

A. Not that I know of.

Cross-examination.

By Mr. Transue:

I have been employed at the Oscoda Air Base seven years. I am familiar with the location of the old bomb casings. I think the location is about twelve miles from the main set of buildings, that is by air. By the road it is about twenty-four miles or something like that, according to which way you go. You can go the long way or short way. I am not familiar with the road that leads right into the target because there are about eight of them, I think. I think there are two bomb targets. Four or five years ago I was at the one from which these old used bomb casings were removed. I haven't been there since they were removed.

Q. Now, when did they start piling those up there?

A. Well, they have been bombing out there for years.

Q. Fifteen or so years, haven't they?

A. Not that type, I don't think. Only about four years or five.

Q. Four or five years of that type?

A. Yes.

Q. How long since they have done any bombing of that type?

A. Probably two or three days.

Q. And they have been piling them up during the time that they have been bombing?

A. They are out there. I couldn't say they piled them up.

Q. Do you know who piled them up in these piles?

A. No.

Q. They allow deer hunters to hunt?

A. They aren't supposed to be there.

Q. You know they do hunt up there?

A. It is all marked. They are not supposed to be there.

The Court: That is Government property up there?

A. It is leased to the Government.

[fol. 9] Howard Sampson Askelson, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Howard Sampson Askelson. I am commanding officer of the Oscoda Air Base. I have been commanding officer since July 1948. We do have signs around the Oscoda Air Base on the property we use for bombing. Those signs are still there. Periodically we go around and put those up that have been knocked down, and replace those that the paint might be worn off of. We have a sign on the entrance to the road to our bombing target. It is "Danger, Keep Out, Bomber Range." I gave you this map, an official map showing the territory that is covered by the base up there.

(The map was received in evidence).

(Captain Askelson marks out area with red pencil showing air base, bombing range and targets).

The target itself was cleared. The used bomb casings were piled on the edge of the cleared out range. There were signs on the road leading to the bombing target, showing it was the bombing target about December 1, 1948. I was out there about 2 days ago and the signs were up then, and I was there December 10, 1948 and the signs were up then.

Q. Now, Captain Askelson, have you ever had any authority on or before December 1, 1948 to dispose of these used bomb casings?

A. No, ma'am.

When the bomb casings are new they are painted blue in color. This is a used bomb casing, I brought from the field today. The bomb casing is as shown here, without the rust. It is painted blue. It is about three and a half feet long, about eight inches in diameter, and empty it weighs around sixteen pounds. And when we use the bomb one hundred pounds of sand is put in it and a three-pound charge of black powder in the rear. Those are the bombs that were used in the practice bombing by the Air Force. The airfield is a sub-base of Selfridge Field. They do all the practice bombing at the Oscoda Air Base. The last time I know that they used bombs was today.

[fol. 10] Q. And this pile that is near the target, what is the reason for them being piled up there?

A. To decontaminate the target area proper.

The Court: That is a military expression. It doesn't mean much to me.

A. They clear all the spent bomb casings off and pile them up so that they will be out of the way. Just clear the area.

Q. Now, is there any danger in these used bomb casings?

Mr. Transue: May it please the court, that is a prejudicial question; it is not involved here, and I ask that it be stricken and the jury instructed to disregard it. It certainly is not involved.

The Court: What is the object of the question?

Miss Kinnane: To show why they haven't salvaged them.

The Court: Because of danger?

Miss Kinnane: Because of possible danger.

The Court: I would be interested in hearing his answer.

A. There is a danger if the black powder has not exploded. When the bomb drops it will in some cases not explode.

Q. Have any of these bomb casings been released since you have been there?

A. No, ma'am.

Mr. Transue: I object to that.

The Court: It has already been answered.

The Court: I would like to know whose Air Force this is. I don't even know who owns these yet.

By Miss Kinnane:

Q. Captain Askelson, who are you employed by?

A. The Government of the United States.

Q. What base is this and who owns these used bomb casings?

A. The United States Government.

[fol. 11] Cross-examination.

By Mr. Transue:

(Exhibits 1 to 6 marked).

Q. Captain, showing you Defendant's Exhibits 1 through 6, I will ask you to look at them and tell me what they are?

A. Spent bomb casings.

Q. And are they at the location? These pictures were taken on the Oscoda Air Base, were they not?

A. On the Oscoda Air Base gunnery range.

Mr. Transue: I offer them all in evidence. They were taken in the presence of the Captain by Kenneth Wallace, a commercial photographer from Flint, Michigan.

Miss Kinnane: Do you recognize these, Captain Askelson, as the places where these pictures were taken?

A. I was there when they took the pictures. It appears to be the same.

The Court: Are you willing to say those are the pictures they took?

A. Yes.

Miss Kinnane: Then there is no objection.

Q. Now, showing you this Exhibit 1, can you state whether or not that is a picture of the pile, a close up of the pile of spent bomb casings that is right close to the road? You and I and the photographer and Mr. Morissette all went out there and took these pictures last Friday, didn't we, Captain?

A. Yes.

Q. And is that the location of that picture?

A. Yes, sir. These are pictures of bombs on our range.

Q. What I am getting at, right as you get near to the end of the road there is this group of bomb casings that lays just to the left, that is right?

A. Yes, sir.

Q. And isn't that a picture of that group?

A. It appears to be, yes.

Q. Is it?

The Court: He says it appears to be.

Q. Then showing you this Exhibit 2, is that another view of the same group? Can you tell that?

[fol. 12] A. I would say it appears to be, yes, sir.

Q. Then showing you Exhibit 5, I will ask you whether or not that is another view, a little farther back, of the same bomb?

A. Yes, sir.

Q. Spent casings?

A. Yes, it is.

Q. Now, showing you Exhibit 4, is this a view from another direction of the same ones?

A. Yes, sir.

Q. There are three piles of these bomb casings in this particular locality, isn't that right?

A. Yes, sir.

Q. And the one is at the end of the road and farther to the left, over some little distance, isn't that right?

A. Yes.

Q. And I will show you Exhibit 6 and ask you if that is a photograph of that?

A. Yes.

Q. This Exhibit 3, is that another picture of the same group, that is over and to the left of the road? Do you understand my question? State whether or not it is a

different view of the same group of the last exhibit that you took?

A. It appears to be, yes, sir.

Q. In this Exhibit 3 there is also the target, or the place where the target is. What do you call this?

A. It isn't a target.

Q. No, that isn't a target. What do you call that?

A. Range house.

Q. And that is where you stay while the bombing is going on, to tell whether it is a hit or not?

A. That is right.

Q. I guess that is about it. That looks out toward it, doesn't it? And this one you just looked at is looking toward the woods, is that right?

A. Yes, sir.

The Court: Now the witness has taken the position you were up there and took some pictures, and they look like it, as far as he knows.

Mr. Transue: It appears like it.

[fol. 13] A. Yes.

Q. When we went up there, Captain, right in front of this group that is to the left there is now a sign, isn't that right?

A. That is right.

Q. As to whether or not there was any sign there, such as that, on December 3, 1948, are you able to say?

A. At that particular point, no.

The Court: What is this sign? How does this sign read?

Q. Do you recall how the sign reads?

A. "Danger. Bombing range. Keep out. United States Army."

Q. But as to whether or not that was there—That is a new sign, isn't it?

A. I don't know.

Q. Didn't it look new?

A. It appeared to be.

Q. And a little farther along there is a small sign that appeared to be new as well, isn't that right, Captain?

A. There was a sign there.

Q. Didn't it look like it was a fresh sign?

A. Not particularly.

Q. Well, now, as to whether or not that sign was there on December 2nd, are you able to say?

A. No, sir.

Q. And any of those signs that we saw all the way up that road, are you able to say whether they were all there on December 2nd?

A. No, sir. I wasn't there December 2nd.

Q. Now it is a fact that people hunt deer through that area, isn't it, Captain?

A. Yes, sir.

Q. By the way, that is government property there, isn't it?

A. Yes.

Q. Do you lease it, or how do you hold it, do you know?

A. It is leased.

Q. From whom?

A. From the Conservation Department and Department of Agriculture.

[fol. 14] Q. Conservation Department of the State of Michigan?

A. Yes.

Q. Department of Agriculture of the State of Michigan?

A. Yes.

Q. And the distance from where you live, the highway, that is kind of a main highway going around there up to where these old spent bombs lay, is about five or six miles up through the woods?

A. From the main road?

Q. Well, from the road where you turn in to go up through there.

A. It is about half a mile from the traveled road.

Q. You think it is about half a mile?

A. Yes.

Q. How far is it from Mikado?

A. I don't know exactly.

Q. Where the main group of buildings is where I saw you, you have your headquarters, how far is it from there?

A. The way we came?

Q. That is right.

A. Twenty-four miles; another way about eighteen.

Q. And by air do you know how far it is?

A. Approximately twelve miles.

Q. That is quite a heavy wooded section back in there, just general deer hunting country like the rest of it up there, isn't it, Captain?

A. Yes.

Q. And how long have you been at Oscoda, in charge?

A. Since July 1948.

Q. How long have you been there altogether? I mean, were you there before you were in charge of the base?

A. Yes. I have been going eight years gunnery captain up there.

Q. How long have you been going there?

A. I was stationed there in 1944; since then.

Q. When was the first time that you went up through the woods, as we did the other day, not in an airplane, but to go so you could see what is on the ground?

A. About a year ago.

Q. That was the first time?

A. Yes.

[fol. 15] Q. And were these old bomb casings that we saw in the pictures there at that time?

A. Yes.

Q. Do you know how long they have been using that particular type of bomb casing at Oscoda Air Base, and shooting it over that target we saw out there that day?

A. The first I used them there was in 1944.

Q. Were they used before that to your knowledge?

A. I don't know.

Q. How long have you been in the Air Service?

A. Nine years.

Q. How long have they had that particular type of practice bomb casing?

A. I am not sure.

Q. How long that you know of?

A. 1944.

Q. That is the first you saw them?

A. Yes, sir.

Q. They might have had them sometime before that, or if they did have them would you know?

A. They might have had them, yes.

Q. And might they have been used at the Oscoda Air Base before that to your knowledge, and you wouldn't know it?

A. Possibly, yes.

Q. So far as you know they have been collecting these things together up there and piling them up since at least 1944?

A. Yes.

Q. And they have been out there and exposed to the weather, are they?

A. Yes.

Q. Are they rusted, the ones we saw?

A. Yes.

Q. They are pretty well rusted out, aren't they?

A. They are rusted, yes.

Q. Some of them so rusted that they are practically decomposed, isn't that right, Captain.

A. I guess so.

Q. And the rest of them are in the process of decomposition?

A. Yes.

[fol. 16] Redirect examination.

By Miss Kinnane:

Q. Captain Askelson, you testified that you were out in this area on December 10th and there were signs up that day?

A. Yes.

Q. A. ! were those signs you saw on December 10th new signs or did they look as if they had been there a few days?

A. They looked as if they had been there.

Q. And had you seen signs at that particular location before December 10th?

A. Yes.

Q. Now, these holes that are in the used bomb casings, do they come from rust or from explosion?

A. Both.

Q. Did Mr. Morissette at any time ask your permission to take these bombs?

A. No.

Q. And what did you do after the report came in to you that these bombs were seen on a truck going south?

A. I notified the State Police; notified the CID Section in Selfridge Field. I asked the State Patrol to find out where they went, who got them.

Right in front of that group of bombs there is now this sign you and I have talked about. That sign appeared like a new sign. I do not recall that particular one. I saw that one when I was out there on December 10th.

Q. Now these signs that are back here farther, there is an older appearing sign as we came into the area, isn't that right?

A. Yes.

Q. That sign says "danger", or something to that effect?

A. Yes, sir.

[fol. 17] Q. Captain Askelson, these signs you told us about being there on December 10th, are they just around this area, or around the entire bombing range.

A. They are around the entire bombing range.

The proceedings had on Tuesday, June 14, 1949, at 10:00 o'clock a. m.

Defendant's witness called with permission of Court out of turn.

MARSHALL HILLMAN, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My name is Marshall Hillman. I reside at Flint. My address is 1106 Lomita. I have known Joe Morissette, the respondent in this case, since 1927. I have lived in the same vicinity that he has resided in since the 17th of March, 1927. I know his reputation for honesty and integrity in the community in which he lives. It is good. I am employed by Consumers Power Company as chief maintenance foreman. I have been in this position since 1928. I have worked for the Consumers Power Company since 1927. I have worked for this company 21 years and better. I am also acquainted with the reputation of Joe Morissette in the community in which he lives for truth and veracity. It is good.

Cross-examination.

By Miss Kinnane:

Q. With how many people have you discussed the reputation of Mr. Morissette for honesty and veracity?

[fol. 18] A. None because I have known him so long.

Q. And you are taking the stand as a character witness here and that is your own opinion then?

A. Yes, ma'am.

Q. You have never discussed this man's character in any way with people in your vicinity?

A. Oh, there is lots of people know Joe.

Redirect examination.

By Mr. Transue:

Q. You know what other people think of him?

A. They can't think anything different than I do.

(The court met pursuant to adjournment).

The Court: I tell you what I am going to do, I am going right ahead, and without prejudice to any of the rights of the defendant to bringing the matter up in event of a conviction.

John V. Wagner, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is John V. Wagner. I live at Oscoda, Michigan. I am a truck driver. I am acquainted with the defendant, Joseph Edward Morissette. I got acquainted with him when he was on a fruit stand at the junction of M-171 and M-23.

Q. On or about the first part of December 1948 did you see Mr. Morissette with a load of bomb casings?

A. I don't know what type of load it was. It was in the fall.

Mr. Transue: I can't hear the witness.

A. I say I don't know just what time it was. It was in the fall when I seen him. I don't know the date.

Q. And whereabouts was that?

A. I met him at the junction of M-171 and 23.

Q. Did you have any conversation with him that day?

[fol. 19] A. Yes, I did.

Q. What was the nature of that conversation?

A. Well, I had stopped him, asked where he got the scrap steel. I seen he had some bomb casings.

Q. Was anything else said while you were talking?

A. I told him he was taking a chance, advised him to take them back where he got them.

I don't remember what he said he was going to do with them. I have lived up around Oscoda for twenty-two years. During that time I have had occasion to go around the bombing range that is marked out on that map. I worked there three years. I always saw signs posted around the bombing range. They are warning signs, all of them. Some of them said, "United States Government Property—Stay Off." They are on all the roads around the bombing range that I went on.

Cross-examination.

By Mr. Transue:

I have been arrested and convicted of bootlegging in 1934.

Q. Any other arrests and convictions?

A. For drunkenness, getting drunk. No, I never served time for being drunk either, I take that back.

Q. Now, witness, on October 8, 1946, at Tawas weren't you arrested and pleaded guilty to being disorderly?

A. They advised me to.

Q. Did you do it?

A. Yes, I did. Yes, I did. I had forgotten that.

Q. Were you ever arrested for any thing else?

A. No, just drunk.

Q. Now, as a matter of fact, weren't you arrested on February 26, 1949, for felonious assault?

A. Yes.

Mr. Transue: That is all.

A. The case was dropped.

The Court: All right.

[fol. 20] MARVIN ATCHISON, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Marvin Atchison. I live at Mikado, Michigan. That is Northeast of the bombing range, approximately sixteen miles. Joseph Edward Morissette is my brother-in-law by marriage. The last week of deer season in 1948 I accompanied him to the bombing range. We hunted the bombing range. We went over to the bombing range to pick up used bomb casings. We made two trips to the bombing range. After we left the bombing range we took them over to the farm where I am employed. When we got to the farm we smashed them down and loaded them on the truck with other stuff he had loaded. We smashed them down with a tractor. When we loaded them on the truck with some other things he bought he headed for Flint as far as I know. That is where he hauled all his scrap iron. I do not know whether he had permission to get these used bomb casings. I was paid for helping him.

Cross-examination.

By Mr. Transue:

I live on a farm. It is my uncle's farm. It is in Mikado, Michigan. That is approximately sixteen miles from the place where we got those old bomb casings. I have lived there for the last twenty-five years, all the time I wasn't in the service. My wife, aunt and uncle live there. I was raised by my aunt and uncle. My sister is Joe Morissette's wife. She was raised there too, part of her life. My aunt and uncle really brought me up. He is sixty-two, and she is in her fifties somewhere. They operate a farm there. The farm is three hundred and fifty acres, all told, with the land we rent. I did deer hunt with Joe. Pat Collins went up one trip with us. We didn't get a deer. I believe it was right in deer season when we went over to get the old bomb casings. We were hunting with Pat Collins for two days. It was after that. We used Joe's truck. There were deer hunters came past us when we were getting these things. There were three cars stopped there while

[fol. 21] we were loading them. We talked with these deer hunters. It was in broad daylight. After we got it loaded on the truck we took it to Mikado, got gas, and went over to our farm. We stopped in another place on the way to the farm, one of our neighbors, and he had some scrap iron to sell and Joe went over and bought that. We took it over to the farm and unloaded it, in the field, right in the corner in plain sight, about ten rods from the road. You could see it from the road in plain sight. It lay out there close to a week. I took the tractor and backed over it for Joe to smash down so he could load it with other stuff he bought, make the load more compact. I wasn't there the day he loaded out. I owed Joe some money. Somewhere around sixty dollars. I understood I was to get paid for my time and labor.

Redirect examination.

By Miss Kinnane:

I didn't have permission to hunt on the bombing range when I went over there this fall, but there had been hunters in there for as long as I could remember. I didn't ask anybody's permisison to hunt on there. I have seen signs posted around the bombing range since I came home from the service.

Recross-examination.

By Mr. Transue:

I have been hunting over there for years. I had never seen them bombs there until after I came home from the service, in 1947. I hunted in the fall of 1946 when I was home on leave. I went up through there in 1946. It didn't look like anything of value to me.

[fol. 22] Howard Smith, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Howard Smith. I am employed by the Michigan State Police. I am stationed at East Tawas. I have

been there the last time since 1946. I was there in 1938 and 1939. I am familiar with the bombing range. I do patrol duty. We get up through the bombing range at least once or twice a month. I have seen signs posted around the bombing range since 1946. These signs say "Danger—Keep Out—Bombing Range." I have seen and know Mr. Morissette, the defendant in this case. He had a fruit stand on the corner of U. S. 23 and M-171 last year. I talked to him in connection with the loss of these bomb casings. That was on December 10, 1948, in Tawas City, south of Tawas City on U. S. 23. He had a load of Christmas trees on his truck at that time. I stopped Mr. Morissette and asked him if he had taken some bomb casings from the Air Base. He stated he had and had taken them to Flint where he had sold them for twenty-eight dollars a ton. I believe he said he had a little over three ton on the truck. He told me he got twenty-eight dollars a ton. We asked him if he had permission to take them and he said no, he didn't think they were any good, or anybody would care if they were hauled away. He said he didn't have any permission to take them.

Cross-examination.

By Mr. Transue:

Joe was coming down with a lot of Christmas trees when we stopped him. I believe we asked him for his operator's license first, and asked him if he would come back in the patrol car so we could talk with him. He did this readily and answered all our questions frankly and freely, without any hesitation on his part. I have been around this territory where the bombs are. I was there in November, three or four times in November, the last part. I have seen bomb casings. I don't know whether defendant's exhibit 1 are the ones or not. I have seen bomb casings there. I have [fol. 23] been on pretty near all those roads in that area at sometime or other. I told you I was up there in November on official business. We had quite a few emergency messages to deliver to hunters along those roads in that area. I never paid too much attention to the location from which these old casings were taken. I could not see whether or not there were any signs in the immediate vicinity of that location. I know there are signs on the road but whether

they are right there I don't know. There were other deer hunters up there.

Q. All over the bombing range?

A. I didn't go out on the range but there were all over the edge.

Q. I mean in the territory known as Oscoda Air Base.

A. Yes, in that territory there were a lot of hunters around the bombing range.

ROBERT EDWARD WALTON, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kinnane:

My name is Robert E. Walton. I am employed as Special Agent of the Federal Bureau of Investigation. I was assigned to investigate part of this accident. I usually cover Detroit territory. However, I was on what is called a road trip to Flint, Michigan, at the time this case was assigned to me. In the course of my investigation I talked with the defendant, Joseph Edward Morissette. I was out to see him. I went to his home at 5117 Horton Street, which is in Flint. However, he wasn't there at the time but I talked to one of his relatives and informed her that I would like to talk to Mr. Morissette. Approximately one week later Mr. Morissette came to the Resident Agent's Office in Flint, Michigan, and at the time he came into the office I was engaged in another matter and I could not talk to him. [fol. 24] He came about half an hour later, I was through and I talked to Mr. Morissette. At the beginning of our conversation I advised him that he didn't have to make a statement; that any statement he made could be used against him in court; and that he could consult an attorney at any time. Mr. Morissette did furnish me with a statement. Mr. Morissette initialed the first two pages of the statement and signed the last page of the statement. This was to indicate that he had read the statement. There was a correction made in the statement which Mr. Morissette also initialed. That was done before it was signed. I have that statement with me.

(Government's Exhibit 1 marked and offered in evidence and received without objection.)

By Miss Kinnane:

Q. Will you read this into the record, Mr. Walton?

A. This statement is dated "January 20, 1949, FBI Resident Agency, Office at Flint, Michigan.

"I, Joseph Edward Morissette, freely and voluntarily make the following statement to James P. McElligott and Robert E. Walton who have both identified themselves to me as Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice. No threats or promises of any kind have been made to induce me to make this statement. I know that I do not have to make a statement and that any statement I make can be used against me in a court of law. I know that I am entitled to consult counsel at any time. I can read and write.

"I am 27 years old having been born August 15, 1921, at Flint, Michigan. My mother and father are deceased but I have two sisters named Beatrice Parrek and Doris Rothr. My wife's name is Geraldine and I have one son Joseph Edward Morissette, 5 years old.

"On November 22nd or 23rd, 1948, I, along with my brother-in-law, Marvin Atchison, were deer hunting on the U. S. Government Air Force bombing range at Oscoda, Michigan. We knew previously that the bomb casings were on this range at Oscoda but we went there to hunt deer. We did not get any deer so we decided to make our hunting trip pay by loading up my 2 ton, 1948 red Studebaker with the bomb casings. My brother-in-law 'Mike' Atchison helped me load about 3 tons of the bomb casings [fol. 25] onto my truck and we left and went to Marvin's uncle's (Alger Anderson) farm and unloaded the bomb casings. I told Alger Anderson my load at the time consisted of bomb casings that I wanted to smash together so that I could carry more on my truck and then take them in to Flint to sell them. On or about the 2nd of December, 1948, I and 'Mike' (Marvin) Atchison loaded the bomb casings on my truck and took them to Flint, Michigan, where we sold them to Joe Laro's Coal and Iron Co., 6301 N. Dort Highway in Flint, Michigan. My load was weighed by a girl in Joseph Laro's office and I believe her name is Catherine. I know she knew my load consisted of used

bomb casings and she paid me about $85.00 for my load. She paid me by check. The bomb casings still had some blue paint on them and the tail fins were still recognizable when I sold them to Laro. I saw other men hunting on the Oscoda range and so I thought I could walk on this property also. I knew the bomb casings were at one time U. S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were.

"I have read the above statement consisting of three pages, initialed all changes and corrections, and the bottom of each page and I am signing this last page. This statement is true and correct to the best of my knowledge.

"(Signed) Joseph E. Morissette.

"Witnesses: SA James P. McElligott, FBI; SA Robert E. Walton, FBI, January 20, 1949, Flint, Michigan."

Mr. Morissette did not ask for an attorney at that time. As I recall Mr. Morissette came into the Resident Agency Office at Flint, Michigan, shortly afterwards and inquired as to the status of his case, but I didn't have any further discussion with him.

[fol. 26] Cross-examination.

By Mr. Transue:

Part of this statement is in my handwriting. The statement is in three people's handwriting, Mr. Morissette, a witness and myself. The part that is written out here, I wrote that, all except the last paragraph. Everything on the first page is in my handwriting, except Joseph Morissette's initials on the bottom of the page. Everything on the second page is in my handwriting except Joseph Morissette's initialed one correction on this page and he initialed the bottom of the page. On the last page, the third page, Joseph Morissette initialed one correction on this page also. The last paragraph of this statement was in Joseph Morissette's handwriting, which states: "I have read the above statement consisting of three pages, initialed all changes and corrections, and the bottom of each page and I am signing this last page. This statement is true and correct to the best of my knowledge.

"(Signed) Joseph E. Morissette."

I talked to Mr. Morissette about this affair and then I tried to reduce the substance of the conversation.

Q. And so along with the rest of it, when Joe told you, as he told the State Police: "I knew the bomb casings were at one time U. S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were." Now, Joe told you that along with the rest of it just the same as he told the State Police, didn't he?

A. Yes, he did.

Q. And you put it in the statement?

A. That is right.

After I let somebody else know at his house that I wanted him, he came into the office voluntarily. Prior to the time that I obtained a warrant for Mr. Morissette's arrest I did not get up and look at these old bomb casings. I have never seen that location. I have never been up on the Oscoda Bomb Range.

[fol. 27] Q. And so at that time you were unfamiliar with the looks of what Joe took as exemplified by this Exhibit 3, isn't that correct?

Miss Kinnane: I object, your Honor. He said he has never been up there so he can't testify to any pictures that were taken up there.

The Court: He can answer. If he doesn't know he can say no.

A. No, I don't.

By Mr. Transue:

Q. You don't know what they look like at all, do you?

A. No, I do not.

Redirect examination.

By Miss Kinnane:

Q. Did you ever see a bomb casing in your investigation at Flint?

A. Yes, I did, on one occasion when I went into the Joe Laro Coal and Iron Company at Flint, Michigan, Mr. Laro presented me with a bomb casing which he said one of his employees had obtained from his junk yard.

Q. And is that bomb casing here?

A. Yes, it is.
Q. Will you show me which one it is?
A. Yes, sir, this bomb casing.

Miss Kinnane: I will offer this bomb casing in evidence as Government's Exhibit No. 2.
The Court: Any objection?
Mr. Transue: No objection. Glad to have it in.

CATHERINE KENNY, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Catherine Kenny. I am employed as bookkeeper for Laro Coal and Iron Company, Flint. I have [fol. 28] worked there for the past twelve or fifteen years. I am not personally acquainted with Joseph Edward Morissette, but I recognize him and know who he is. On or about the 1st part of December I bought scrap from Joseph Edward Morissette. I looked at it when it came on the scale. I have the records of Laro Coal and Iron Company with me, and the check stubs. Our check stubs show we paid Mr. Morissette for scrap in the first part of December. The dates we paid him are December 2 and December 6. Those check stubs were made in the regular course of business and in my handwriting.

(Government's Exhibits 3 and 4 in evidence:)

Mr. Transue: No objection.

By Miss Kinnane:

Q. Government's Exhibit No. 4 is a check stub dated when?
A. December 12, 1948.
Q. And issued to whom?
A. Issued to Joe Morissette.
Q. And what was the purchase?
A. It was for 8,160 pounds of mixed scrap.
Q. And how much did you pay him?
A. $28 a ton.

Q. And what is the total of that check?
A. $114.24.
Q. And Government's Exhibit 3 is dated when?
A. December 6, 1948.
Q. To whom?
A. To Joseph Morissette.
Q. For what?
A. For 2,070 pounds B, that is bailing scrap, at $28 a ton or $28.98; 650 pounds metal at 3¢ a pound, $9.75; 10,070 pounds of mixed scrap $251.75. Total check $290.48.
Q. Do you remember whether or not that purchase consisted of casings?
A. The bailing scrap,—it was mixed loads that Mr. Morissette brought in mostly—but the bailing scrap that might have been. I don't remember these two particular loads.
Q. It could have been but you don't recall, is that correct?
A. I don't remember.

[fol. 29] Cross-examination.

By Mr. Transue:

Q. Do you know, witness, whether or not both loads had this old stuff on, or what was on it?
A. As I remember, I don't recall this thing here at all, this blue one there. This one here, there might have been some on one load; but I didn't see on this mixed load, it was mostly steel cast and heavy scrap.
Q. Will you identify which one of these checks paid for the one that had some of those old tins on there that have been identified here as used bomb casings?
A. I really couldn't.
Q. You don't know which load it was. Now, Mr. Morissette has hauled a lot of junk into the Laro Coal and Iron Company, hasn't he?
A. That is right.
Q. Over how long a time?
A. I have been on the Dort Highway two years. I would say all of those two years that I have been in that location I have seen him periodically——
Q. At different times?
A. —once or twice a week.
Q. In the summer time did you see him?

A. Not so much in the summer but occasionally.
Q. Mostly in the fall and winter time?
A. That is right.

Redirect examination.

By Miss Kinnane:

During the month of December I believe there is one other stub in this bunch that we purchased. This was all the scrap bought in December, that was in the last part of December.

Miss Kinnane: Government rests.

[fol. 30] JOSEPH EDWARD MORISSETTE, called as a witness on his own behalf, being first duly sworn, testified as follows:

My name is Joseph Edward Morissette. I was born in Flint, August 15, 1921. I am twenty-seven years old. I am married. I was married eight years in January. I have one child. He is six years old. I am living with him and my wife at 5117 Horton Avenue in a trailer house. My uncle owns the house at 5117 Horton Avenue. I am engaged in the fruit business at the present time, located at G 5010 North Saginaw Road, just outside the city limits of Flint. I have been in this location since this spring. Last year I operated a fruit market at Oscoda. I was in the United States Army and was honorably discharged. I was honorably discharged from the United States Army in February, 1944, I believe. I was in the CC Camps. I was sixteen years old when I went to the CC Camp. I went there because I had no other means of living at home. Just my mother was living. She died while I was in. My father passed away about a year and a half before that, so I went to the CC Camp to take care of myself. I have never been arrested or convicted of anything except speeding one time. I have worked at fruit markets, and hauled scrap iron, and done a little trucking. I worked in the A. C. Spark Plug for four and a half years, I guess. I was in the A. C. Spark Plug when I went into the service and I went back when I got out. From the A. C. Spark Plug I went into business in a fruit market. I haul Christmas trees every year. I have one

truck, a Studebaker, 1948 Studebaker, a stake truck. I went deer hunting last fall. Mr. Collins went with me and another party from Cheboygan, Steve Cineski and his wife, and a few other people. We went over on Drummond Island for a week and then I came back and I hunted at my brother-in-law's place for the second week. Mr. Collins hunted with me around Oscoda for two days and I took him over to his brother's place at Evart. And my brother-in-law and I hunted ourselves the rest of the time. While I was hunting with Mr. Collins and my brother-in-law, we were hunting on the Oscoda bomb base. The bomb base woods is very good deer country. Nobody got a deer there. My father-in-law got one out of there, and I guess an uncle [fol. 31] of ours got one out of there, but not when I was with them. Pat Collins got a deer up at Drummond Island. When we were hunting we saw these old tins that were expended bombs. I have seen all those pictures. I am familiar with them. I was there when the pictures were taken. Exhibit 3 is a picture of a pile that is down at the end of the road and to the left, that is back. We never even seen that pile until we was there with you. Neither one of us, I don't believe, has ever seen that. That was back off the road. Defendant's Exhibit 6 is another picture of the same pile looking toward the woods. Defendant's Exhibit 2 is what is left of a pile from which we took something. The ones we took looked exactly like the ones that remained there. Defendant's Exhibit 5 is a picture of two piles that are right close together from which we took some from each pile. The ones we took look about like the ones that are left. That is right on the side of the road. The road that goes up through there is a trail. They have them marked off in mile sections. While we were up there hunters came by, we talked to them. Three of them was in a coupe and they stopped and talked to us for a while, asked us about deer and stuff. I don't recall the names of any of those folks, I had never seen them before. Defendant's Exhibit 4 is a picture of the two piles from another view from which we got some of those old bomb casings. The ones we took look the same as the ones that are left. Over toward the far side of the picture is the road that is traveled and this picture is taken looking toward that road. Defendant's Exhibit 1 is a close-up of one of those piles from which we took some of the old bomb casings and the ones we took looked

like the ones that are still there. Marvin Atchison was with me when we got them. Mr. Collins and Mr. Atchison were with me when I first saw them there. There is now a sign in front of those two piles that are close together.

Q. Was that sign there when you——

A. No. That sign wasn't there.

It was broad daylight when we took them out of there, about one or two o'clock in the afternoon. I imagine eight or ten people passed through there while we were taking them. A couple cars drove by and this one coupe stopped [fol. 32] and talked. I took them out to the farm, around twenty miles from where they lay. We just threw them out in the field with the rest of my junk. I had about six or seven tons piled around there. I bought that around garages, farms. Everybody know I was picking up junk through there, and they used to come and see me and get me to go over and buy it, clear up their yard. This pile of junk, including what was left of these old bomb casings, was out in plain view of the road. Anybody could see that was driving along. We left them right there until—we was deer hunting, you know, and we finished up—and when we had some spare time we took the tractor and run over it so I could get on some of my other junk, some of my steel and stuff. Mr. Atchison had to do some plowing or something, and he went away, and I hired a couple of kids to help me load up my truck that day. And I had Mr. Collins' deer stored at the plant locker. He stored that there when we first came back from Drummond Island. That plant locker is located right over by the air base. I got loaded up and went over to the locker, got the deer, and started toward home. That pavement is 171 and it goes around this air base. I came down that road in broad daylight, it was right in the afternoon. I had an army stake body on my truck, open, these old bomb casings were in plain view. I went over to the locker. I don't remember the name of the man who has the locker. There is only one place there and he is the operator of it. It is outside the village, out toward his farm. I would say a mile, mile and a quarter out of the village, maybe two miles. It is quite a ways. You turn off the highway and go back in about a quarter of a mile, or half a mile. Mr. Wagner's daughter-in-law was there taking care of the children that afternoon. She was the only one there. I got the deer and loaded it on

myself. Then I started toward Flint. It was still daylight. To get to Flint I took 171 pretty near to the junction of 23. Mr. Wagner came by in a truck and he flagged me down and I stopped, and he came back and talked to me and told me he had some scrap over to his place he wanted to sell. He wanted me to pick it up. I told him I couldn't take it then but I would come back and maybe get it on my next [fol. 33] load. And he asked me what I had on and I told him I had some old bomb casings on. I heard what he said in regard to telling me to take them back. Nothing like that was ever said. I talked to Mr. Wagner about five minutes, ten minutes, I don't know. I had been previously acquainted with him. I became acquainted with him when I was running my fruit market on the junction of 171 and 23. Right at that corner there is a beer tavern a little farther in and I had, right out in the open, a fruit stand. I also did a wholesale business in this fruit business. I sold to stores and restaurants all the way from Oscoda. I started in around Pinconning and ended up around Alpena, all the stores, restaurants, and stuff like that. That was last summer. During that time I got acquainted with Mr. Wagner, and when I stopped there I knew him and he knew me.

The Court: Is Wagner the one said he told him to take this back?

Mr. Transue: That is right.

By Mr. Transue:

Q. And you have already told us nothing like that was said, is that correct?

A. That is correct.

I would never have stopped but he waved his hand so I stopped. He said he had some stuff over in his yard that he wanted to sell. From there on I think I stopped and had a sandwich. I think it was in Oscoda or around Houghton there. I parked my truck right there on the highway, up in front of the restaurant in broad daylight. I made no effort to conceal anything. I didn't think there was any reason for me to conceal anything. I kept on going after I got the sandwich. I sold this to the Larco Coal Company. I don't know which one of these two loads had these old casings on it. I don't quite remember the date that I took them down. They had the stubs, and I had about seven ton of other stuff. We put three ton of that there stuff on and

you have quite a large load, which I imagine it was on that $114 load. A little while after that I went up north to Cheboygan and bought some Christmas trees and I recall the State Police stopping me. I told them about the old bomb casings. Just like the officer said. Later on I heard [fol. 34] the FBI man wanted to see me. I went right down and saw him. I went down the next day after I knew he wanted to see me. He asked me about these bomb casings. I told him right out and he wrote out the paper that has been presented here. I have been buying junk off and on for about three and a half, maybe four years. I go all over, pretty near all over Michigan to buy this junk. I go up through the Thumb, around Port Huron, Bad Axe. I have even been up as far as Marquette on the other side, above the Straits; get around over in Lansing once and a while, and through there. I generally do it in the winter months. In the summer I run a fruit business. I am in that business now. I operated a fruit stand up there last summer and during that time I was going north, and around, and wholesaling fruit.

Cross-examination.

By Miss Kinnane:

Q. And you were aware of the area covered by the bombing range?

A. Just in deer season. There is nothing around there anybody wants to get back in there for any other time.

The Court: Were you aware of the signs around the bombing range?

A. In some places.

Q. How often had you been at the bombing range before you went deer hunting this last fall?

A. Well, I have been in there about for the last three years, deer hunting.

Q. And you knew that was the bombing range that belonged to the United States Government, right?

A. I knew it had at one time.

The Court: Did you know it at the time? She asked you that question.

A. Yes.

Q. You know it is still being operated up there as a bombing range?

A. I didn't know it was being operated as a bombing range.

Q. What made you think there had been any cessation in the operations up there, Mr. Morissette?

[fol. 35] A. I had heard from hearsay they didn't do any more bombing up there.

Q. Just hearsay. You don't know of your own knowledge?

A. No, I don't.

Q. You never made any inquiries, did you?

A. No, I never.

Q. Do you make a practice of going around picking up things that are on other people's property?

A. I don't.

Q. This wasn't your property?

A. No, it wasn't.

Q. Did you have any permission to be on it?

A. No, I never, no.

Q. Did you have any permission to pick up the bomb casings?

A. No.

Q. They didn't belong to you?

A. No, they never.

Q. And how big is the stake body on your truck?

A. It is a ton and a half rated—two ton truck. It is about eleven feet long, about eight feet wide—seven feet six inches wide.

Q. You made how many trips over to pick up bomb casings.

A. I imagine we was there once or twice—twice, I think.

Q. And after you crushed these bomb casings down you had about three ton of bomb casings, right?

A. I did.

Q. And on top of that you loaded other stuff?

A. I had some steel underneath it and around onto it.

Q. You mean you just sort of tucked these bombs around the top?

A. No. They were out in plain sight so everybody could see them.

Q. You loaded the bomb casings on first, is that right?

A. No, I never.

Q. You put the other stuff on first?
A. That is right.
Q. Sure of that?
[fol. 36] A. Yes, I am.
Q. On top of that you put a deer?
A. I put the deer on the cab of my truck.
Q. Put that on the cab of your truck?
A. Yes.
Q. What did you put over the top of the bomb casings to hold them in the rack?
A. I never put nothing.
Q. They were just loose up there?
A. That is right.
Q. And you had three ton of them, is that right?
A. Somewhere around that. I don't know for sure.
Q. Approximately how much other stuff did you have?
A. Well, I had batteries, about fifty-five batteries worth four dollars apiece—about a couple hundred dollars.
Q. How much did they weigh?
A. What, the batteries? Well, I imagine a battery will weigh about thirty-five pounds.
Q. Anything else you had on that truck?
A. Had some steel.
Q. How much did it weigh?
A. I don't know.
Q. You don't know?
A. That is right.
Q. Isn't it a fact, Mr. Morissette, that you were arrested for reckless driving and not speeding?
A. It was somewhere in there.
Q. There is a difference between speeding and reckless driving, isn't there?
A. I don't know if there is or not.
Q. Did you pay a fine?
A. I did.
Q. How much did you pay?
A. Thirty-five dollars, I believe.
Q. And was that an alternative to a fifteen-day sentence? Was that an alternative to a fifteen-day sentence?
A. I imagine it was.
Q. Do you know or don't you?
A. I believe I know.
Q. Now, this happened along about the first part of December, right, Mr. Morissette?

[fol. 37] A. What?

Q. That you brought these bomb casings down to Flint?

A. Somewhere after deer season.

Q. What time does it get dark along the first part of December?

A. I imagine 4:30 or 5 o'clock.

Q. And what time would you say you started to bring these down to Oscoda?

A. From Oscoda?

Q. To Oscoda?

A. I started out from the farm about 1:30 or 2 o'clock in the afternoon.

Q. What time did you leave Oscoda?

A. Well, I imagine it was about 4 or 4:30.

Q. Mr. Wagner testified and Mr. May testified he saw you approximately around four or four-thirty at the junction of U. S. 23 and M-171. Would you say that is about right?

A. Somewhere around that time, yes.

Q. It was beginning to get dark then, wasn't it?

A. Oh, no. You could see very plainly. There were no lights or anything on. I would probably be around Omer or Standish by the time it got dark.

Redirect examination.

By Mr. Transue:

The corner of 171 and 23 is about a mile north out of the city limits of Oscoda.

Q. You think it was 1:30 or 2 o'clock when you left the farm?

A. Yes.

Q. Why would it take you two hours to get to the place where you saw Mr. Wagner?

A. I had to load that deer on by myself and it was quite a job.

Q. Took you sometime to go in and get that deer, is that right?

A. Yes.

Q. What was there from the appearance of this junk out there in the woods that made you think it had been thrown away?

[fol. 38] A. It was rotting.

Q. Part of the tin and things were decayed?

A. That is right.
Q. Rusted right out?
A. Yes.
Q. And so you thought it had been abandoned?
A. That is right.

Recross-examination.

By Miss Kinnane:

Q. It was still on property of the United States Government, wasn't it, when you picked it up?
A. I guess it was.
Q. You guess it was. Don't you know?
A. I didn't know at the time, no.
Q. Didn't you testify you hunted on the bombing range?
A. I did.
Q. Isn't the bombing range government property?
A. It is if it is marked. There is some State land around there, too.

The Court: You knew it wasn't your property, didn't you?
A. Yes.
The Court: Didn't you say on cross-examination you knew this was government property where you got the bomb casings, didn't you say that?
A. Yes, sir.

Q. In your statement, Mr. Morissette, didn't you say you were hunting deer on the United States Government Air Force bombing range at Oscoda, Michigan.
A. Yes.
Q. You knew that was government property then, didn't you?
A. Yes.

[fol. 39] Lionel Collins, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My right name is Lionel Collins. They have it Pat, there. That is a nickname, that is what you know me by. I live

at 1118 Ruth, Flint, Michigan. I have lived at Flint around thirty years. I work at the Chevrolet. I have worked there better than twenty-five years. I have worked as a set-up man around twelve or thirteen years. I am married and have three children. I went deer hunting with Joe Morissette last fall. I have known Joe ten or twelve years. We went to Drummond Island. I got a deer. We came back and hunted two days around Oscoda. I left my deer in cold storage. We went over to the Oscoda Air Base and hunted. I saw other hunters over there. There were plenty of them. I saw these old bomb casings up there in the woods. I didn't see any sign close to the junk. I call it junk because that is what it looked like to me. I knew Joe was hauling junk into Larco Coal Company.

Q. Did you say anything to him about that that would be junk to haul?

A. Yes, sir.

Q. Do you remember the conversation?

A. I asked him if that was worth anything.

Q. Yes.

A. He said it would be if he could get it smashed down so he could get enough of it so it would pay him.

Q. I see. And that was the conversation that took place there?

A. That is right.

I live in the same part of Flint that Joe Morissette lives in. I know quite a few people that know him. I know part of his friends and neighbors. I am acquainted with the reputation of Joe Morissette in the community in which he lives for honesty and integrity. It is good.

[fol. 40] Cross-examination.

By Miss Kinnane:

I have never gone hunting with Mr. Morissette before. I have never been up around Oscoda before. I saw the signs back on the road when I approached the bombing range. They had been there but they were pretty well shot to pieces. I can't tell you what the sign said. I saw one sign. I was driving along the edge of the bombing range. I drove right through it I believe. I can't show you on the map where I came in that day. I am not acquainted with this country. I did not ask anybody who owned this junk,

as I call it, these bomb casings. I wasn't on my own property. They didn't belong to me.

Q. They had some value to you though if you took them?

A. I don't know.

Q. If you had taken them they would have had value to you?

A. They wouldn't be no good to me.

I didn't help Joe load this stuff on the truck. I wasn't up there when he went in and got it. I don't actually know whether he took it or what happened. I just went hunting with him.

Q. How many people have you talked to and discussed the reputation of Mr. Joseph Morissette as to integrity and honesty?

A. Not at all.

Redirect examination.

By Mr. Transue:

Q. You also know his reputation in the community in which he lives for truth and veracity? Answer that yes or no. Do you know the reputation of Joe Morissette in the community in which he lives for truth and veracity? Answer yes or no.

A. Yes.

Q. Is it good or bad.

A. It is good.

[fol. 41] By Miss Kinnane:

Q. How many people, Mr. Collins, have you discussed the reputation of Mr. Morissette as to truth and veracity with?

A. None.

Redirect examination.

By Mr. Transue:

Q. You don't go around talking about the truth and veracity of people, do you, Mr. Collins, of your friends and neighbors?

A. No, I don't.

Q. You are just like everybody else in that regard?

A. Try to be.

Recross-examination.

By Miss Kinnane:

Q. How do you know what somebody else thinks then of Mr. Morissette, Mr. Collins, if you haven't talked to them?

A. I believe I am well enough acquainted so I would hear.

Q. All you know is what you think yourself, isn't that it?

A. That is right.

Redirect examination.

By Mr. Transue:

Q. You mean by that all you know is what you think yourself, and what other people think of Joe?

A. Yes.

Q. Is that right?

A. That is right.

[fol. 42] Richard T. Marlett, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My name is Richard T. Marlett. I live at 1059 Marengo. That is in the north part of Flint. That is in the same vicinity that Joe Morissette lives. I have known Joe Morissette about twenty years.

Q. What is your business, Mr. Marlett?

A. Retired captain of fire department. I was captain of a fire department at Flint, Michigan, station No. 3 located at Wetherby and Detroit.

I spent six years at that station. I knew Joe's folks, his father and mother. I know they died quite a while ago. Joe is pretty well acquainted around that end of town, yes. He should be, he lived there long enough. I know the general reputation of Joseph Morissette in the community in which he lives for honesty and integrity. I would say it is good. I know the general reputation of Joe Morissette in the community in which he lives for truth and veracity. It is good.

Cross-examination.

By Miss Kinnane:

Q. Mr. Marlett, how many people have you discussed the reputation of Mr. Morissette with as to honesty and integrity?

A. Well, as a rule there is no occasion to discuss anythink like that.

Q. You have talked it over with anybody then?

A. About Joe's character?

Q. Yes.

A. Why, no.

Q. And have you ever discussed the reputation of Joe as to truth and veracity with anybody?

A. He is supposed to be a truthful man.

Q. Have you ever discussed the reputation of Mr. Morissette for truth and veracity with anybody?

A. Yes.

Q. Whom?

[fol. 43] A. With whom?

Q. With whom?

A. Name them, you mean?

The Court: Yes.

By Miss Kinnane:

Q. And on what occasion was that?

A. What is that?

Q. On what occasion was that, when?

A. I can't tell you no date.

Q. Was it lately, Mr. Marlette?

A. That I have talked to somebody about Joe's honesty and that, is that what you mean?

Q. His reputation for honesty, yes. The last question was his reputation for truth and veracity. Did you ever discuss Joe's reputation for truth and veracity with anybody?

A. Yes, I have.

Q. And who was that now?

A. Why, I can't name anybody. He is supposed to be, as a general rule, a truthful, honest man; that is what I believe.

Redirect examination.

By Mr. Transue:

Q. You heard people say good things about Joe?
A. That is right.
Q. The way he takes care of his family?
A. That is right.
Q. Tell us the good things you have heard about Joe.
A. The good things?
Q. Yes.
A. I understand he is a good worker, honest. I will say that about his working; and the honesty I will also say it myself.
Q. And is he well thought of by the people that he lives and works with?
A. Yes.

[fol. 44] JOHN BRANDON, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My name is John Brandon. I live at 1110 Marengo Avenue, Flint. I have known Joe Morissette for twenty years anyway. I knew his folks. I knew his father and mother well.

Q. Are you acquainted with the general reputation of Joe Morissette in the community in which he lives for honesty and integrity; and answer yes or no?
A. Why, yes, I know him for years.

The Court: Do you know his reputation in the community?
A. Yes, his reputation is good.
Mr. Transue: Just one more question.

Q. Do you know the reputation of Joe Morissette in the community in which he lives for truth and veracity? Answer yes or no.
A. Yes.
Q. Is it good or bad?
A. It is good.

Cross-examination.

By Miss Kinnane:

Q. Mr. Brandon, have you discussed the reputation of Joe Morissette for honesty and integrity with anybody?

A. Why, I heard them talk about him now and then. I never heard nobody say anything bad about him.

Q. You have never discussed his reputation though?

A. What?

Q. You have never discussed his reputation?

A. No. I never have, no.

Q. Did you ever discuss his reputation for honesty and integrity?

A. No, I never have.

Q. In other words, your opinion is what you think of Mr. Morissette yourself?

A. Why yes.

[fol. 45] Q. Is that right?

A. I never heard a bad word about Joe in my life around there.

Q. How often do you see Mr. Morissette?

A. How often?

Q. How often do you see him?

A. I don't see him very often, maybe twice a week, twice a month, or something like that. He is at the market most of the time.

Mr. Transue: Respondent rests.

The Court: How much time do you want to argue?

Miss Kinnane: About twenty minutes.

The Court: Fifteen minutes a side.

All right, you might as well excuse the jury because I am going to tell you what you can argue on, and what you can't argue on.

Excuse the jury. Take them upstairs for a minute.

(The jury retires from the courtroom.)

The Court: Gentlemen, you have asked here an instruction. Have you seen the instructions that they ask?

Miss Kinnane: Yes.

The Court: Have you any objection to them?

Miss Kinnane: No, I haven't. You mean the ones he has? No, I haven't been served with them, your Honor,

if that is what I saw him hand up to you. I haven't seen them.

Mr. Hood: Here is your copy.

The Court: Have you any objection to that first one?

Miss Kinnane: Yes, your Honor. I think it is not incumbent upon us to show felonious intent at the time of taking. And a man's acts could be assumed, intent could be assumed from his acts.

The Court: It says, "If he thought the government had thrown away or abandoned this property, you will find him not guilty, if he is mistaken in his belief."

Do you think that is the law?

Miss Kinnane: I do not.

The Court: Neither do I. Gentlemen, I don't think it is the law. I am not going to permit you to argue to this jury that this man can go on somebody else's property, [fol. 46] take property, and then go away and say, "I thought they abandoned it."

Mr. Hood: May I say just one word on that point?

The Court: Certainly.

Mr. Hood: This further authority, 52 Corpus Juris Secundum 820.

The Court: The case you gave is not in point at all. The case was of an automobile on the street that had been there for six or seven days and left near a creek. People had stolen things out of it. It looked as though it had been abandoned, not on anybody's property.

Unless you can show me something right on the point, the only question might be the seriousness of the offense—that is the punishment. But certainly you cannot go on a piece of property, take something away, and say, "I thought they had abandoned it," because no farm in the country would be safe, and no home would be safe.

Mr. Hood: Your Honor, a felonious intent is an element of the crime.

The Court: Yes, sir. To do what?

Mr. Hood: Of a crime.

The Court: To do the thing that you did do. But you can't come in and say, "I thought it was abandoned." If you can show me any authority on that, where it is another man's property, I want to see it.

Mr. Hood: I want to distinguish between a crime and a trespass. There is no doubt but what it would be a civil

trespass case. If the government wanted to sue him, they could get their money for the value of the property, as a farmer could do. But there is a distinction between that and a crime, where a man is convicted of a felony for an honest mistake.

The Court: What honest mistake can there be when you go on another's man's property and take it? If you can show me something, gentlemen, I am in a receptive mood. But the case you show me is not in point. And besides that is not the law.

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority sells, conveys or disposes of any record, voucher, money, or thing of value of the United States [fol. 47] or of any department or agency thereof * * *" etc.
>
> "Shall be fined not more than * * *" this, that and the other.

Gentlemen, unless you have something ready, you needn't discuss it with me, because if that is the law I want to find it out.

Mr. Hood: On this Southwestern case, the point about that he was taking another man's property.

The Court: On a public highway.

Mr. Hood: But he was committing a trespass on another man's property, whether on a public highway or not.

The Court: If that is true, you can come into my house, and year after year you can see an old suit over in the corner that you think I have abandoned, and walk away with it and say, "I thought it was abandoned."

As a matter of fact, he was down to Lansing this week, he said, and if he had gone around the capitol and found it abandoned, he might have taken the capitol.

Mr. Hood: I can take the property your Honor, without committing a crime, if I honestly believe I have a right to take it, whether I am mistaken in my belief or not.

The Court: If he took this under color of right, that is one thing. He didn't take it under color of right, he took it because he thought it was abandoned and he knew he was on government property.

Mr. Transue: That is it exactly, Judge. He took it because he thought it was abandoned.

The Court: That is no defense. I won't permit you to argue it to the jury, and if I am wrong I am wrong, if that is the law of the United States.

Miss Kinnane: I could come in and take a car and say I thought it was junk.

Mr. Hood: What is the difference between a crime and a civil trespass? Is there none?

The Court: Gentlemen, when he walked on the property he committed the trespass.

Mr. Hood: How about the trespass of taking and carrying away?

The Court: That is also a civil wrong, but Congress has made that another kind of crime.

[fol. 48] You haven't shown me anything that changed my opinion in this case from the day the man was brought in here. That the court might consider in the punishment, that is entirely different.

Mr. Transue: May I say this?

The Court: Certainly.

Mr. Transue: Our theory of this is that if Joe Morissette, when he picked those things up, thought nobody wanted them, it would be like junk that would be alongside the road. It is the state of his mind at the time. You have to have a state of mind to be a thief.

The Court: The state of his mind was to take something that didn't belong to him, and there is the intent. If I am wrong, I am wrong. Bring in the jury.

I will not permit you to show this man thought it was abandoned. If that is the law I want a higher court than I am to say so.

As a matter of fact, if objections had been made on the character witnesses, the court would have ruled that out. I don't know why you should have got-en up here and asked the questions, and they didn't object to them. Those aren't character witnesses, none of them is a character witness, but I am going to permit it to go in, although I don't know why.

I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property.

All right. I don't know how much time you want now. You can have ten or fifteen minutes a side.

(The Court met pursuant to recess.)

Mr. Transue: May it please the court, we have been in the bar library in an endeavor to find material in support of our position.

The Court: All right, let me see it.

Mr. Transue: Could the jury be excused?

The Court: No, just bring it up here.

Mr. Transue: The question of intent, all of those cases under consideration say there must be felonious intent. That is a question for the jury.

(Discussion between court and counsel out of hearing of jury and the reporter.)

[fol. 49] CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury: It is the duty of the court to instruct you as to what the law is in this particular case.

I first will read you what the charge is against the defendant. They charge he violated Section 641, Title 18 of the Code.

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money or thing of value of the United States or any department or agency thereof or any property made or being made under contract for the United States or any department or agency thereof; * * *" shall be punished as follows.

This defendant, as all defendants in a criminal case is presumed to be innocent, and that presumption continues throughout the trial and during the deliberations of the jury, and is overcome when and only when his guilt is established beyond a reasonable doubt.

From the beginning of the trial until the end, the District Attorney has the burden of establishing beyond a reasonable doubt every fact essential to the conviction of the defendant. The defendant has no burden to sustain. It is enough that his evidence, taken with the people's raises a reasonable doubt as to his guilt, in which case he must be acquitted.

I have said that the government must prove its case beyond a reasonable doubt. Reasonable doubt does not mean a mere doubt, but it means just what the words themselves indicate, that there is a doubt founded in reason, and arising from the evidence, nothing extraneous, but from the evidence itself. It is not a mere hesitation of a mind to accept proof because of a more or less chance or possibility of error, or because of a disinclination to pronounce guilty on account of the punishment which may follow. You have nothing to do with the punishment at all. And if it should develop that there are mitigating circumstances, and that the defendant is guilty, it is up to the court, not you, to say what the punishment will be.

[fol. 50] You and I know this, everything relating to human affairs, depending upon evidence, is open to some possible, imaginative or speculative doubt. But reasonable doubt is a real doubt arising from the evidence, based on reason such as an intelligent man or woman can entertain, and if necessary to put into words could be explained.

In this case the defendant has brought forth some character testimony. I instruct you that evidence of the defendant's good character may be considered by you, with other evidence in the case, and may in connection therewith be sufficient to raise a reasonable doubt in your mind as to the guilt of the defendant. In other words, sometimes the case is so close that you ask yourselves, "What kind of reputation has this man got?" And it may even create a reasonable doubt, where otherwise there would be no reasonable doubt, no reasonable doubt would exist.

Now, let us see what is charged here, and let us see what the evidence shows. The evidence shows that the defendant in this case went up to Oscoda on the bombing range, property of the United States Government. He saw some of these old bomb shells up there, stacked. There were different piles all around. I permitted pictures to be shown to you as to just what they were. Now, he says that he thought that they were abandoned. He knew that they didn't belong to him, however. And I don't know whether the testimony proves this or not, but there is evidence to show, and you can arrive at the conclusion that he knew what they were from and for, what they had been—bomb shells. Anybody could see they were empty bomb shells. They were piled indiscriminately around the place where the target was.

He had been up there before, had been up there hunting. He hunted on government property, which may or may not be all right. I am not criticizing that because I think a lot of people do that. So it isn't a question whether he went up there and hunted on the property of the government at all. You can disabuse your mind of that entirely. But while he was up there he did find these stacks, and later on came up with his truck, took about three tons, took them down, and sold them.

[fol. 51] Now, he admits that. The defense that they sought to introduce here was that he thought it was abandoned property. And I instruct you that there are some instances where a person can take property that appears to be abandoned, and take it and really be guilty of no criminal offense. And this court permitted all the testimony to go in. But when it comes to the time of instructing the jury, I must instruct you that in this case there is no evidence of abandoned property. Abandoned means absolute relinquishment, including both the intent to abandon, and the external act by which the intention is carried into effect.

And when the evidence is such as to raise the issue, abandonment is a question for the jury. But ladies and gentlemen, I hold in this case that there is no question of abandoned property. In the first place, this man knew that he was on government property. He knew it was the bombing range. Whether he knew it or not is immaterial. The bomb shells were on somebody's property and they didn't belong to him.

In every crime there must be an intent to do the thing that the person does. For example, if you walk away with a thousand dollars in your pocket that you don't know is there, you hadn't intended to steal that thousand dollars at all. There is no intent. But the question is here. Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it.

It isn't a question of whether the government is careless or not. You can go into a bank and if they have left a thousand dollars, or five hundred dollars, or any money on the counter carelessly, you can't pick that money up and say, "I thought somebody had abandoned it and, therefore, it belongs to me." That is no defense in this case. It is no

defense in this case any more than it would be if they came to your house and saw an old suit of clothes, or an old hat, and had seen it for years at your house and had never seen you wear it, but they decided you had abandoned that suit of clothes, or hat, and walked away with it.

[fol. 52] He had no right to take this property. He had no right, and it is no defense to claim that it was abandoned, because it was on private property.

Now, there are cases of abandonment, for example, where sometimes you see an old automobile along the road that somebody has left there, and by the time the vandals get through there isn't very much left, and somebody comes along later on and decides to take a part of that property. It has been left there in the road, in the highway. But if I were to hold according to the theory of the defendant here, that a man can walk on anybody else's farm, or anybody else's property, and pick up something, and do it in the open, and then sell it, and say, "I thought it was abandoned property and, therefore, I am not guilty," it would be a most unusual law. That is not the law as I understand it.

You may feel the government is to be criticized for leaving that property out there. I don't know whether it should be or not. The government, especially the Armed Forces, do a lot of things in leaving their property out, that you and I don't approve of, but how do we know what the government intended to do up there? Three thousand pounds of it was sold at somewhere near $84. They might have been waiting for it to get in such quantity that they could send a freight car up there and take it and sell it, because it might become very valuable. At one time during the last war that kind of junk was valuable. We don't know what may be in the minds of the military officials, and for any man to go up there and take the property, he is committing a wrong under this section of the act.

I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you

have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to [fol. 53] this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty.

That is all there is for this jury.

Any exceptions to the charge?

Miss Kinnane: None, your Honor.

The Court: You wish an exception to the charge?

Mr. Transue: Exception, of course.

The Court: Your exception is I should submit to the jury the question of abandonment?

Mr. Transue: Not only the question of abandonment, but also the condition of his mind and the intent that he had at the time that this was removed; that there must have been a felonious intent in his mind to take it away and not be just a trespass.

The Court: Well, all-right.

The question on infent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.

You may make any other objection on the record.

Mr. Transue: On the record?

The Court: After the jury has left.

Swear the officer.

(Officer sworn).

(The jury retires at 1:46 o'clock p.m.).

The Court: Now you may enter the objection.

Mr. Transue: The objection is this, as I understand the court's charge, that the taking is the intent.

The Court: No. I leave the question to them whether he intended to take it. He says he did.

Mr. Transue: But the taking must have been with a felonious intent.

The Court: That is presumed by his own act.

Mr. Transue: That is my exception.

The Court: All right.

[fol. 54]. Mr. Transue: That the felonious taking cannot be derived just from the taking.

The Court: All right, overruled.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST TO CHARGE

1. The defendant took the property and sold it. There is no question about that.

The question is: What was in Mr. Morissette's mind at the time he took it? Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.

Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

2. "If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized."

(5 Reid's Branson Instructions to juries p. 133, Sec. 3365(2).

3. Good character is an important fact with every man, and never more so than when he is put on trial charged with an offense which is rendered improbable in the last [fol. 55] degree by a uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a shield of protection against the most skillful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring a conviction of innocence. In every criminal case it is a fact which the defendant is at liberty to put in evidence, and,

being in, the jurors have a right to give it such weight as they think it entitled to.

Transue & Hood, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

VERDICT—Entered June 14, 1949

(Indictment for Vio: Sec. 641 USC, Title 18—Theft of Government Property)

At a session of said Court held in the City of Bay City on the 14th day of June, A. D., 1949.

Present: The Honorable Frank A. Picard, United States District Judge.

The defendant, Joseph Edward Morissette, being present in Court, and the jury heretofore empaneled being again in [fol. 56] Court, and having heard the proofs and testimony of witnesses, the arguments of counsel and the charge of the Court, retire from the Bar thereof, under the charge of officers duly sworn for the purpose, to consider their verdict; and after being absent for a time, come into Court again, and in the presence of the defendant, say upon their oaths that they find the said defendant, Joseph Edward Morissette, guilty of the charge in said indictment contained.

Examined, approved and ordered entered:

Frank A. Picard, United States District Judge.

IN UNITED STATES DISTRICT COURT
JUDGMENT AND COMMITMENT

(No. 4469 Criminal Indictment in One count for violation of U.S.C., Title 18, Sec. 641)

On this 14th day of June, 1949, came the United States Attorney, and the defendant Joseph Edward Morissette appearing in proper person, and with his attorney, Andrew J. Transue, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to-wit: Theft of Government Property and the defendant have been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court It Is By the Court

[fol. 57] Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two months from and including this date, or to pay a fine of Two Hundred ($200.00) Dollars for the use and benefit of the United States, together with the costs of the case, which payment is to be made within fifteen (15) days from this date.

It Is Further Ordered, that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Frank A. Picard, United States District Judge.

Approved as to form:

(S.) Janet E. Kinnane, Asst. U. S. Attorney.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 24, 1949

The name and address of appellant is Joseph Edward Morissette, 5117 Horton Street, Flint, Michigan, and the name and address of the appellant's attorneys is Transue and Hood, 304 Dryden Building, Flint, Michigan.

The offense is charged as follows: The indictment sets forth and the Grand Jury charges, "That on or about the 2nd of December, A. D., 1948, at Oscoda, Michigan, in the [fol. 58] Eastern District of Michigan, Northern Division, Joseph Edward Morissette, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings have a value of approximately

$84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18. A true Bill, Alfred Grueber, Foreman."

A concise statement or order, giving the date and sentence is, The defendant was found guilty as charged in the indictment on June 14, 1949 and was sentenced by the Court, the Honorable Frank Picard presiding, to be imprisoned in a place to be selected by the Attorney General of the United States for Two months or a fine of $200.00 and costs of $133.98. The amount of cost is according to a letter sent me by the Assistant United States Attorney at the direction of the Court. The defendant was on bond and his bond was continued.

The above named defendant, Joseph Edward Morissette, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the above stated judgment and conviction.

Dated: June 23, 1949.

Transue and Hood, Attorneys for Appellant.

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL—August 1, 1949

The motion for a new trial by defendant having been made, briefs of counsel filed, and the Court being fully advised in the premises, and in accordance with the opinion of the Court;

It is ordered that the motion of defendant for a new trial, be and the same hereby is denied.

Frank A. Picard, District Judge.

Order re filing record omitted.

[fol. 60] IN UNITED STATES DISTRICT COURT

ORDER—March 4, 1950

Pursuant to subdivision I of the rules of civil procedure, and on motion of Andrew J. Transue, attorney for the above named defendant and appellant,

It is ordered that defendant's exhibits 1, 2, 3, 4, 5, and 6 be sent to the Circuit Court of Appeals for inspection and use in connection with defendant's appeal.

It is further ordered that the said exhibits may be transmitted to the Circuit Court of Appeals by the defendant.

Frank A. Picard, District Judge.

[fol. 61] Stipulation as to contents of the record omitted.

Stipulation waiving comparison of the record omitted.

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(October 6, 1950—Before: ALLEN, MARTIN and McALLISTER, JJ.)

This cause is argued by Andrew J. Transue for appellant and by Janet E. Kinnane for appellee and is submitted to the Court.

JUDGMENT

(Entered February 5, 1951)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed February 5, 1951)

Before ALLEN, MARTIN and MCALLISTER, Circuit Judges.

MARTIN, Circuit Judge. On this appeal from a judgment of commitment and sentence, the only significant issue is whether the district court erred in its interpretation of Title 18, section 641, United States Code, which provides: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The appellant contends that, in order to constitute a crime, there must have been a felonious intent in his mind at the time he converted to his own use property of the United States located on premises leased by it. This argument was rejected, the district judge taking the practical and correct view that the statute means what it says and is violated when a person "knowingly converts to his use" government property. The facts of record cannot reasonably be controverted that the appellant knew what he was doing, namely converting to his own use property of the United States when he took and carried it away and subsequently sold it for his own benefit. In effect, he merely denies that he had an evil or felonious intent.

The further insistence is made that if appellant believed that the government had abandoned the property taken by him, he should not have been found guilty, though mistaken in his belief. The district judge charged the jury that there was no evidence of abandonment of the property by the United States, and that appellant's

claim that the property had been abandoned constituted no defense in the circumstances.

The uncontroverted proof shows that appellant took from property leased by the government some three tons of used bomb casings, owned by the government, and sold them for approximately $84.

Briefly reviewed, the salient facts are that appellant, a junk dealer who also operated a fruit stand in the summertime, went on a deer hunt with his brother-in-law. They entered upon Oscoda Air Base which was leased by the United States from the Conservation Department and the Department of Agriculture of the State of Michigan. This military reservation was used as a practice bombing range and was in such use on the day of the trial.

In a statement voluntarily made to the Federal Bureau of Investigation, appellant related that he and his hunting companion did not get any deer, so they decided to make their hunting trip pay by loading up his two-ton truck with used bomb casings. Without permission of the Commanding Officer of the air base, or without permission of anyone representing the United States, appellant took and carried away from the government reservation, in two truck loads, some three tons of used bomb casings undeniably property of the United States. The used bomb casings were piled on the edge of a cleared-out range and were each about three and one-half feet long, eight inches in diameter, and when empty weighed around sixteen pounds. The Captain commanding Oscoda Air Base testified that he had never had authority to dispose of used bomb casings, and that appellant at no time had asked his permission to take any of them. Morissette admitted that he had received no permission to pick up the bomb casings and knew that they did not belong to him. After taking the used bomb casings to a nearby farm and crushing them, appellant loaded his loot into his truck. He carried the bomb casings to Flint, Michigan, and sold them there to a coal and iron company. He testified that the bomb casings were rusted and that he thought they had been aban-

doned. He emphasized that he took them in broad daylight and made no effort at concealment. After considerable hedging, he finally admitted under questioning by the judge that he knew the bomb casings were on government property when he took them.

The statute which appellant violated (Title 18, sec. 641, United States Code) condemns not only the embezzlement, stealing and purloining of government property, but also the knowing conversion by a person to his own use, or to the use of another, of anything of value belonging to the United States, or the sale or disposition without authority of any government property. The conversion to his use and the selling of the bomb casings without authority were, as appears from the record, knowingly done by the appellant.

Appellant's attorney urges that both the indictment and the statute require proof of felonious intent. We are unable to accept this interpretation as valid. As to the indictment, the federal courts long ago abandoned the course of reversing convictions for crime on the technical niceties of pleading. An indictment is sufficient which fairly apprises the defendant of the charge which he is to meet and enables him to prepare his defenses and, after trial, to stand against double jeopardy upon a plea of former acquittal or former conviction. This court has frequently stated the principle. *Dowling Bros. Distilling Co., et al.* v. *United States,* 153 F. (2d) 353, certiorari denied 328 U. S. 848, rehearing denied 329 U. S. 820; *Bogy* v. *United States,* 96 F. (2d) 734 (and cases there cited), certiorari denied 305 U. S. 608; *Blum* v. *United States,* 46 F. (2d) 850. Authorities from other circuits are overwhelmingly to the same effect. See cases digested in 34 Federal Digest, section 71, under title "Indictment and Information." See also Rule 7(c), Rules of Criminal Procedure, 1950 Revised Edition, wherein, after prescribing the essential contents of a valid indictment, it is provided: "The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged

therein to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." The indictment in this case fully meets the test. Morissette was sufficiently apprised of the charge against him and could never again be convicted for taking the used bomb casings here involved and selling them as he did.

The statute in question (section 641) which consolidates sections 82, 87, 100 and 101 of Title 18, United States Code, 1940 Edition, is not limited in coverage to embezzling, stealing and purloining government property, but also blankets the knowing conversion of such property by anyone to his own use. It is not at all unusual in federal statutes to find that Congress has, in a single paragraph, defined separate and distinct crimes involving different elements.

Manifestly, the purpose of Congress in enacting section 641 was to afford added protection against the taking of government property. The word "or" as used in the statute evinces that purpose. If it had been intended to require knowing coversion to fall within the same category with embezzlement, stealing and purloining, the word "and" would have been used in the statute. Furthermore, the phrase "knowingly converts to his own use or the use of another" would be surplusage if placed in the same category with embezzlement, stealing and purloining.

Though we had independently reached our conclusion as to the correct construction of section 641 before research brought to our attention *Adolfson v. United States*, 159 F. (2d) 883 (C. A. 9), we find that case supports our own interpretation. There, the Court of Appeals for the Ninth Circuit was required to construe section 87 of Title 18, United States Code, which was one of the statutes consolidated into section 641 of Title 18. See Title 18, U. S. Code Congressional Service, 80th Cong., 2d Sess., page 2505. The Court of Appeals in the *Adolfson* case stated that the insistence of Adolfson was

that section 87 is purely an embezzlement statute; that the indictment charged embezzlement and nothing more; and that to "apply the property of another to one's own use is to embezzle." The contention was thus rejected: "The simple language of section 87 refutes that argument for it covers several specifically named offenses wholly apart and divorced from the technical offense of embezzlement. One of these specifically and separately named offenses is that of knowingly applying to one's own use property 'furnished or to be used for the military or naval service.' The prohibition against knowingly applying Government property appears in the text of section 87 after the word 'or' which follows the reference to the offense of embezzlement. The use of the word 'or' clearly indicates alternative circumstances (Cf. *Barkdoll* v. *United States*, 9 Cir. 147 F. (2d) 617, 618) and was obviously intended to identify and define a wholly separate and distinct offense, and we so hold. Appellant would have us read out of section 87 a meaning, a purpose, a definition, and a protection of public property which to us clearly appears to speak the plain intent of the lawmakers." 159 F. (2d) 885, 886.

In passing, it might well be observed that, while the pertinent portion of the statute before us exacts as essential to conviction knowledge by the accused that he is converting property of the United States to his own use, scienter is not even an essential ingredient of all statutory crimes defined by Congress. In *United States* v. *Behrman*, 258 U. S. 280, 288, the Supreme Court said: "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." See also *United States* v. *Jackson*, 25 F. 548 (C. C.); *United States* v. *Guthrie*, 171 F. 528, 531 (D. C.). An outstanding authority on the subject of scienter is the opinion of Chief Justice Taft in *United States* v. *Balint*, 258 U. S. 250. The Supreme Court there held that, to constitute the offense of selling drugs contrary to the Anti-narcotic Act, 38 Stat. 785, it is unnecessary that the seller be aware of the character of the drugs; and that punish-

ment for an illegal act done by one in ignorance of facts making it illegal is not contrary to due process of law. See *United States* v. *Reese*, 27 F. Supp. 833, applying this principle to the Migratory Bird Act.

Appellant urges that, inasmuch as he believed the bomb casings which he took, carried away and sold had been abandoned by the government, there was presented a question for the jury with appropriate instructions as to what was the condition of Joseph Morissette's mind at the time he took the bomb cases.

Abandonment of property, in order to exculpate one taking it, must include both intention to abandon and an act or acts carrying such intention into effect. As was held in *Log-Owners' Booming Co.* v. *Hubbell*, 135 Mich. 65, 69 (an action of replevin), both the intention to abandon and actual relinquishment must be shown. It will not excuse one who takes property without permission to state that he was under the impression that the property had been abandoned and that he had a right to take it. In the case before us, the property of the United States taken and converted to his own use by appellant was not without value and had merely been stacked up and left lying on the government military reservation. Appellant made no investigation as to his right to take the property, and neither asked nor received permission to take it. One witness testified that, when he saw the used bomb casings on the truck upon which appellant moved them away, he "wondered why anybody else could get them when we couldn't get them for our scrap drive for the Chamber of Commerce and Agriculture." Captain Askelson, Commanding Officer of the Air Base, testified that he had never been given authority to dispose of the used bomb casings owned by the United States Government; that Morissette at no time asked his permission to take them; and that when he received the report that the government property had been taken he notified the state police and a section of the Criminal Investigation Division of the Army, and asked the state patrol to find out who got the bomb casings and where they were.

Generally speaking, the question of whether property has been adandoned is, of course, for the jury; but here, as the district court held, all the testimony proves that the property had not been abandoned by the government of the United States, and the district judge so instructed. The defense throughout was based upon insistence that, in order to convict there must have been a criminal intent in the defendant's mind. The trial judge had to meet that issue, and we think correctly did so. He could not leave to the jury the interpretation of the federal statute. No proof was adduced by the defendant to the effect that the property had actually been abandoned.

The comments in the charge of the judge show that he believed appellant had no legitimate defense. In our opinion, greater restraint in expression should have been exercised. The court, however, charged the jury as to the burden upon the government to prove its case beyond a reasonable doubt; that the defendant was to be presumed innocent, unless the presumption was overcome by the establishment of his guilt beyond a reasonable doubt; and that the jurors were the judges of the facts of the case and could return a verdict of not guilty.

As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions. To reverse and remand for a new trial because of the expressions of the district judge in his charge would be to ignore the spirit as well as the letter of Rule 52(a) of the Federal Rules of Criminal Procedure respecting harmless error. That rule provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." As was said in *Kotteakos* v. *United States*, 328 U. S. 750, 764, 765: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress."

The lenient sentence imposed evinced a sound exercise of judicial discretion vested in the district courts in em-

powering them to make the punishment fit the crime within the limits of the statute violated.

The judgment is affirmed.

McAllister, Circuit Judge, dissenting. Appellant was indicted for unlawfully, wilfully, and knowingly stealing and converting to his own use metal bomb casings from a bombing range of an Army Air Base in Michigan. He was convicted, and appeals, claiming that the district court erred in virtually directing a verdict of guilty against him.

The background of the case is as follows: Joe Morissette, age twenty-seven, an honorably discharged American soldier, lived with his wife and small son in the northeastern part of Michigan, at a small town, Oscoda. To support his family, he worked in fruit markets, hauled scrap iron, and did a little trucking. He owned a small motor truck. In the fall of 1948, he was deer hunting with his brother-in-law and a friend in the bomb base woods in the neighborhood where he had been living. This is a large wooded and waste area owned by the Conservation Department of the State of Michigan, and is located almost in the midst of state and national forests and state game areas, operated as public hunting grounds. It had been leased to the federal government as a base for training Army bombers. Among sportsmen, it was known as good deer country and was used for hunting by many people.

In using the so-called bomb base for training bombers, Army planes dropped practice bombs on a certain portion of the area. These practice bombs are made of a thin casing of metal about 3½ feet long and 8 inches in diameter. Approximately 100 pounds of sand is poured into a casing, and on top of this is placed 3 pounds of black powder. When the casing is dropped to the earth, the black powder is ignited, and the smoke puff shows the location of the strike. After the practice bombs have been used, they are cleared off the range and thrown in

piles beyond the target area "so that they will be out of the way," as the commanding officer of the base expressed it.

In hunting through the area in the fall of 1948, Morissette and his two companions came upon one of these piles of old used bomb casings in the middle of the woods. The casings in question had been cleared off the target area and thrown into piles for approximately four years. They were exposed to the weather and were pretty well rusted out. Some were practically decomposed and others were in the process of decomposition. The pile was located about half a mile from a traveled road and about six miles from the main highway. Morissette testified that he thought the casings had been abandoned and it occurred to him to take a load of them over to the farm where he kept his junk pile of scrap metal purchased from farmers and collected through the countryside. He planned to flatten the casings out so they could be more easily transported. At the time he came upon the pile, he had his truck nearby, and his two companions helped him to load it with the casings. It was broad daylight. Other hunters coming through the woods saw them loading the casings and stopped to talk to them about the prospects of getting deer in the locality. After Morissette got the casings to his junk pile, he flattened them out, reloaded them on his truck with other metal scrap, and drove to Flint, where he sold them for $84.00. Altogether, they weighed three tons. On his way to Flint, a distance of 180 miles from where he had found the casings, they were in full view on his truck. He stopped several times at various places to do errands, also parked at a restaurant where he had something to eat. During these times, the truck was alongside the highway, and the casings were in view of any passer-by. Sometime later, when he was in Northern Michigan at Cheboygan to get Christmas trees, a state police officer stopped him and inquired about the casings. He told the officer that he had taken them and sold them for $28.00 a ton at Flint; and that he did not think they were any good or that anybody would care if he took them. An agent of

the Federal Bureau of Investigation later called at his home and left word that he wanted to see him. As soon as Morissette received the message, he went to see the agent, told him that he had taken the casings and sold them at Flint, and repeated that he had thought they were no good to anyone.

Morissette was later indicted for unlawfully, wilfully, and knowingly stealing and converting the metal casings to his own use, in violation of Title 18, United States Code, Section 641.

The statute provides:

> "Whoever embezzles steals, purloins, or knowingly converts to his own use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;
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> * * * * * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *"

The indictment against Morissette charged:

> "That on or about the 2nd day of December, A.D., 1948, at Oscoda, Michigan, in the Eastern District of Michigan, Northern Division, JOSEPH EDWARD MORISSETTE, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18."

On his trial, Morissette testified that he did not intend to steal the property, and that he did not take the casings with any wrongful intent; and he stated that he thought they had been abandoned. Counsel for Morissette contended that he was entitled to show that there was no wrongful intent in taking the casings; and, furthermore, that the property had actually been abandoned. The trial court, however, referring to this contention and defense, said: "he took it because he thought it was abandoned and he knew he was on government property. * * * That is no defense. * * * I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property." The court, accordingly, refused to submit the question of Morissette's innocent or wrongful intent to the jury or allow it to be argued. The court stated: "I will not permit you to show this man thought it was abandoned. * * * I hold in this case that there is no question of abandoned property." On the question of intent, the trial court charged the jury: "And I instruct you that if you believe the testimony of the government in this case, he intended to take it. * * * He had no right to take this property. * * * and it is no defense to claim that it was abandoned, because it was on private property. * * * And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. * * * The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty." After the jury left, exceptions were taken, and counsel for appellant said:

> "The objection is this, as I understand the court's charge, that the taking is the intent.
>
> "THE COURT: No. I leave the question to them whether he intended to take it. He says he did.

"MR. TRANSUE: But the taking must have been with a felonious intent.

"THE COURT: That is presumed by his own act."

Upon this appeal, it is contended by appellant that where an act is made criminal by statute if "knowingly" committed, such act must be committed with wrongful or felonious intent; that where felonious intent is made an element of a crime, a specific criminal intent on the part of the accused must be proved; and that such criminal or wrongful intent is never presumed from the mere act, where wrongful intent is made an element of the crime. Counsel for Morissette submits that the question of the innocent or wrongful intent of the appellant in this case was a question of fact to be determined by the jury. Furthermore, it is contended that appellant was also entitled to have submitted to the jury the issue whether the property which he removed from the area had been abandoned.

In brief, appellant's chief contention is that he was entitled to have the court submit to the jury the question whether he took the property with felonious intent, and that the court, by its refusal to submit the question of his intent to the jury, committed reversible error.

In considering the issues, we come to the discussion of those cases where *scienter*, as an element of a statutory crime, is not expressed in the statute; where an act is made a crime if "wilfully" done; and where the act is made a crime if "knowingly" done. Various of the statutes and indictments reviewed in the adjudicated cases, in referring to the commission of the offense charged, use the phrases "unlawfully and wilfully," "wilfully and knowingly," and "unlawfully, wilfully, and knowingly"; and many courts have passed upon the meaning to be given these different terms.

When used in a criminal statute, "wilfully" generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely; without ground for believing it is lawful; or conduct marked by careless disregard whether or not one has a right so

to act. *United States* v. *Murdock*, 290 U. S. 389, 394, 395.

Whether *scienter* is a necessary element of a statutory crime, though not expressed in the statute, is a question of legislative intent to be answered by a construction of the statute. *United States* v. *Balint, et al.*, 258 U. S. 250. In the foregoing case, defendants were indicted for unlawfully selling a derivative of opium, and demurred on the ground that the indictment failed to charge that they had sold the inhibited drug knowing it to be such. The court held that whether *scienter* was a necessary element in a crime was a question of legislative intent to be ascertained by the court. In that case, it is to be noted, however, that there was no provision in the statute making the act criminal if "knowingly" committed. It seems to follow, from the authority of the *Balint* case, that although *scienter* is not made an element of an offense, yet by construing the statute through ascertainment of the legislative intent, *scienter* may be found to be necessary to its commission. If the offense is statutory, and intent or knowledge is not made an element thereof, a conviction may be had upon proof of its commission. *United States* v. *Reese*, D. C. Tenn., 27 F. Supp. 833. In *United States* v. *Schultze*, D. C. Ky., 28 F. Supp. 234, where a certain act was declared unlawful in a criminal statute, it was held that a defendant might be guilty on commission of the act, even though there was no evidence of any guilty knowledge or intent upon his part. But the court emphasized that the statute in question had failed to use the word "willfully' or the word "knowingly" or any similar phrase.

In *Mackey* v. *United States*, 6 Cir., 290 F. 18, the court had occasion to pass upon the question whether *scienter* was a necessary element of a given statutory crime, and in its consideration of the case, referred to the *Balint* case, remarking that the statute in that case did not make knowledge an element of the offense. The opinion went on to say that it was held in the *Balint* case that the manifest purpose and intent of Congress was to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition

of the statute. The court observed that the Anti-Narcotic Act, there under consideration, was a regulatory measure, and quoted the Supreme Court, as follows:

> "Many instances are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is eventually upon the achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."

The court then went on to say:

> "In determining the legislative intent, consideration should be given to the nature of the offense with which the statute deals, and particularly where a crime involves moral turpitude and the statute does not describe the offense, but merely uses the common-law name, as 'larceny,' * * * All the cases sustaining indictments which fail to aver scienter, to which our attention has been called, charged acts of commission in violation of prohibitory statutes, in which knowledge and intent was not made an element of the offense. In such cases there is a strong presumption that it was the legislative intent that averment and proof of scienter should not be required."

From the foregoing, the conclusion is evident that, in statutory crimes, generally, where the emphasis of the statute is upon some social betterment, *scienter* is not an element of the offense; but where the emphasis is upon the punishment of crime, as in cases of *mala in se*, *scienter* is a necessary element, even where not so specified in the statute.

It is said that the meaning of the word "willful" depends upon the nature of the criminal act and the facts of the particular case, and that it is only in a few criminal cases that "willful" means "done with a bad purpose"; that, generally, it means no more than that the person charged with the duty knows what he is doing; it does not mean that, in addition, he must suppose

that he is breaking the law. *Townsend* v. *United States*, App. D. C., 95 F. 2d 352, 358. But although it is within the power of the legislature to make an act criminal in the absence of criminal intent, yet where there is nothing in a statute to indicate an intent to punish an innocent, though intentional, taking away, the use of the term "willful" in reference to such taking, implies an evil intent without justifiable excuse. *People* v. *Jewell*, 138 Mich. 620. Wilfulness, it has been held, when used to characterize an act in the realm of criminal law, means more than mere voluntariness. "It implies a purposeful design to do a thing with evil or illegal design." *Bowles* v. *Jung, et al.*, D. C. Cal., 57 F. Supp. 701, 709.

In *Spies* v. *United States*, 317 U. S. 492, the court was confronted with the problem of the different meanings of the word "willful," as used in various sections of the Internal Revenue Code, and in discussing the distinction, said: "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. . . . It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." In *United States* v. *Perplies*, 7 Cir., 165 F. 2d 874, 876, the court, in distinguishing between the use of the word "wilful," as used in felony and in misdemeanor statutes, said: "The

defendant asserts that the word 'wilful' as used in criminal statutes implies an evil intent or motive, and the court erred in the instant case by not so instructing the jury. We do not agree that in all criminal statutes the word 'wilful' must be so construed. The context of the statute in which the word 'wilful' is used is often most important. * * * In statutes involving moral turpitude and therefore constituting felonies, the word 'wilful' is usually given the meaning contended for by the defendant, but the use of the word 'wilful' is without such implication in misdemeanor statutes. *Fields* v. *United States,* App. D. C., 164 F. 2d 97, 100."

Whatever qualification there may be in the various cases in which an offense is made criminal by statute where "unlawfully" committed or "wilfully" committed, the decisions seem uniform that where an offense is made a crime by statute only where "knowingly" committed, it is necessary to prove felonious intent. In this case, the principal argument appellant submits to us is that he had the right to have the jury decide whether he took the property with felonious intent.

"Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. 'The word "wilfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood, says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i., sect. 428." *Felton* v. *United States,* 96 U. S. 699, 702. Where an act must be "knowingly and willfully" done to be criminal, not only a knowledge of the act is implied, but a determination with a bad intent to do it; and the presumption of wrongful intent, based upon the natural result of the words or acts, while constituting strong evidence of the presence of such intent, is not conclusive, but rebuttable. Such rebutting evidence may take the form of testimony by the defendant that he intended no such result. *Bentall* v. *United States,* 8 Cir., 262 F. 744, 746. In *United States*

v. *Starkey*, D. C. Ill., 52 F. Supp. 1, Judge Lindley, in a case in which a defendant was found guilty of a statutory offense, observed: "The word 'knowingly' in a criminal statute commonly means that state of mind wherein the person charged is in possession of facts under which he is aware he can not lawfully do the act with which he is charged." In *Ex parte Stewart*, D. C. Cal., 47 F. Supp. 415, 417, in passing upon the element of *scienter* in the violation of the Selective Training and Service Act, it was said: "However, because the statute uses the word 'knowingly' (50 U. S. C. A. Appendix Section 311), which implies wilful knowledge and a specific intent, we have allowed defendants in Selective Service cases to give their reasons for failure to obey, as going to intent." Likewise, in *United States* v. *Hoffman*, 2 Cir., 137 F. 2d 416, it was held that to "knowingly fail or neglect" to perform a duty required by the Selective Training and Service Act, there must be present the usual criminal intent. In *United States* v. *Martinez*, D. C. Pa., 73 F. Supp. 403, 407, where a defendant attacked an indictment for failure to allege knowledge of defendant, the court considered the matter as one of form and held that in the ordinary acceptation, "the words 'unlawfully, willfully, and knowingly,' when applied to an act or things done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing."

From the foregoing, it seems plain that the statute, in making criminal an act where one "knowingly" converts to his use government property, implied a conversion with bad purpose and evil intent. If more were required to sustain the conclusion that felonious intent was an element of the crime set forth in the statute, the meaning of the phrase, "knowingly converts to his use," could well be ascertained by reference to the other anomalous words associated with the statute under the doctrine of construction *noscitur a sociis*. The provision in the statute reads: "Whoever embezzles, steals, purloins, or knowingly converts to his use . . . ." The terms, "embezzles," "steals," and "purloins," give color to the term "knowingly converts to his use." In

Neal v. *Clark*, 95 U. S. 704, the Supreme Court had before it a statute which provided that no debt of a bankrupt created by his fraud should be discharged. The question was whether the statute referred to implied fraud, also known as fraud in law, or whether it meant positive fraud, or fraud in fact. In laying down the rule for the construction of the statute, the court said: "It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.' In *Broom's Legal Maxims*, p. 450, it is said: 'It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*,—the coupling of words together shows that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure, . . . the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words. * * * 'In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter.' Applying these rules to this case, we remark, that, in the section of the law * * * which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." Pages 708, 709. With equal force it can be said in the instant case that the words, "knowingly

converts to his use," coupled with the words, "embezzles, steals, purloins," involving moral turpitude, mean a conversion to his use, with evil intent—if such intent be an element of embezzlement, stealing, and purloining.

There is no question that to constitute embezzlement, there must be a fraudulent intent to deprive the owner of his property and appropriate the same; *Hancey* v. *United States*, 10 Cir., 108 F. 2d 835; *Hubbard* v. *United States*, 9 Cir., 59 F. 2d 850; *Fortney* v. *Commonwealth*, 290 Ky. 659, 162 S. W. 2d 193; and such intent is always a question for the jury; *Lindgren* v. *United States*, 9 Cir., 260 F. 772. Stealing has frequently been said to be synonymous with larceny; and to purloin means to commit larceny or to steal. *Thompson, et al.* v. *United States*, 2 Cir., 256 F. 616. It might be that because of the particular wording of a statute or on account of special circumstances, the terms "steal" or "purloin," as employed in a given case, would not import larceny. But here there is no reason to suppose that they do not.

Moreover, a resort to the history of the statute itself reveals that it is concerned with embezzlement and larceny. Title 18 U. S. C. A., Section 641 (1950 Revised Ed.), consolidates Sections 82, 87, 100, and 101 of Title 18 U. S. C., 1940 ed. See Reviser's Notes Title 18 United States Code, Congressional Service, p. 2505 (1948 Ed.).

Title 18 U. S. C. A., Section 82 (1940 Ed.), which was consolidated in the present Title 18 U. S. C. A., Section 641, provided, in so far as here applicable, that "Whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin" any property of the United States, would be punishable by fine or imprisonment or both. Title 18 U. S. C. A., Section 87 (1940 Ed.), provided that "Whoever shall steal, embezzle, or knowingly apply to his own use," arms or property to be used for the armed forces should be similarly punished. Title 18 U. S. C. A., Section 100 (1940 Ed.), provided that "Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever" of the United States should be similarly punished. Title 18 U. S. C. A., Section 101

(1940 Ed.), provided that "Whoever shall receive, conceal, * * * or shall have or retain in his possession * * * any money, property, * * * or valuable thing whatever, * * * of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined," shall be similarly punished.

"Changes necessary to effect the consolidation (of the above sections) were made. Words 'or shall willfully injure or commit any depredation against' were taken from said section 82 *so as to confine it* (Section 641) *to embezzlement or theft.*" (Emphasis supplied.) Reviser's notes. Title 18 United States Code, Congressional Service, p. 2505 (1948 Ed.).

Prior to the consolidation of Title 18 U. S. C., Section 87, in the present Section 641, it was held that such section dealt with "larceny." *Price* v. *United States,* 5 Cir., 74 F. 2d 120. In *Crabb* v. *Zerbst,* 5 Cir., 99 F. 2d 562, it was observed that the counterpart of Title 18 U. S. C., Section 100, which was repealed and re-enacted as a part of the Criminal Code of 1909, was included in the repealing section of the Code as "An Act to punish certain larcenies and the receivers of stolen goods." It was said by the court that the section denounced embezzlement by name, without definition; and then, to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under the common law, it added the words "steal or purloin." The court remarked that between embezzlement and larceny "there lies a gap which has grown wider and wider as the multifarious activities of the central government have spread and increased. Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word *purloin.* * * * Where the offense is embezzlement, or its nature so doubtful as to

fall between larceny and embezzlement, it may be prosecuted under Section 47." Title 18 U. S. C., Section 100 (1940 Ed.) *Crabb* v. *Zerbst, supra,* p. 565.

Title 18 U. S. C., Section 101 (1940 Ed.), which was consolidated in the present Section 641, relates only to the offense of receiving and concealing property of the United States, which has been embezzled, stolen, or purloined by another, with knowledge of such embezzlement or theft.

That the phrase, "knowingly converts to his use," in a criminal statute, was intended by Congress to import larceny, seems clear from the employment of this particular language. It could not have been intended to mean a conversion merely in a civil sense, the commission of which is, in itself, the offense. Intent to convert to one's own use is, by the weight of authority, one of the elements of larceny. *McIntosh* v. *State,* 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798, with annotation; and in Bouvier's Law Dictionary, Rawle's Third Revision, one of the definitions of larceny is given as the felonious taking of the property of another without his consent and against his will, with the intent to convert it to the use of the taker. It seems a fair assumption that in drawing the statute, Congress considered that the felonious conversion of property of the government to one's own use, was larceny, and used conventional phrasing to express that intention.

An examination of the foregoing sections, and Section 641, in which they were finally consolidated, in the light of the words used in the sections themselves, the decisions of the courts, and the notes of the revisers of the present Criminal Code, leaves no doubt that the offenses made criminal by the latter section are embezzlement, larceny, and offenses falling between embezzlement and larceny, as well as the concealment of stolen property with knowledge that it has been stolen, or the application to one's own use of property furnished to the armed services, with knowledge that it had been stolen. We are not here concerned with embezzlement or concealment, or application to one's own use, of stolen property, but

only with larceny, stealing, or purloining. The felonious taking and carrying away of property constitute the common law offense of larceny; and the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses, which are often denominated "theft" or "stealing." *Crabb* v. *Zerbst, supra*, p. 564. From the foregoing, it can be said that, aside from extreme verbal refinement, the offenses of stealing and purloining property and knowingly converting it to one's use, made punishable by the criminal statute in this case, are all equivalent to common law larceny.

In *Frach* v. *Mass.*, 9 Cir., 106 F. 2d 820, the court said that "Larceny of property of the United States is made a crime by 18 U. S. C. A., Section 82." That section, consolidated in present Section 641, as has been observed, referred to "Whoever shall take and carry away or take for his own use, * * * with intent to steal or purloin" property of the United States. In *United States* v. *Anderson, et al.*, D. C. Cal., 45 F. Supp. 943, 945, the court, in referring to Title 18 U. S. C. A., Section 82, said: "This means, of course, that in interpreting the statute, we may apply the principles governing the common law crime of larceny, as interpreted by the courts of various states."

On this general subject, it remains finally to be said that, from the language of the indictment and the brief of the district attorney, it appears that the government has always considered that Morissette was being proceeded against on an indictment for larceny, under a statute providing penalties for larceny. The indictment charges that appellant "did unlawfully, wilfully and knowingly steal and convert to his own use" the property in question. As heretofore outlined, the cases hold that a charge that an accused "unlawfully, wilfully and knowingly" committed an act condemned by a criminal statute, imports its commission with criminal or evil intent. The use of the phrase, "steal and convert to his own use" clearly charges larceny. The indictment itself is entitled, "(Theft of Government Property)." The citations in

the government brief are principally concerned with the elements of larceny and the nature of the intent necessary to constitute the crime; and it is emphasized that, by any rule of law, appellant's act constituted the stealing of government property. Moreover, it appears that the government assumed that it was necessary to charge a felonious intent in this case for, in answer to appellant's contention that the indictment was defective for failure to charge such intent, it replied that the term "unlawful" (as used in the indictment in this case) "is an adequate substitute for 'felonious,' "; and it further supported its argument by relying upon rulings that where an indictment for theft used the words "wilfully and unlawfully," rather than "knowingly" or "feloniously," it was unnecessary for the indictment "to contain such formal words, *where the allegations thereof necessarily or fairly import guilty knowledge.*" (Emphasis supplied.)

That the government recognized from the foregoing that the conversion of which appellant is accused must be committed feloniously or with guilty knowledge is further pointed up in its brief where it argues that a jury may infer a man's intent from his acts, citing *Harris, et al.* v. *United States*, 9 Cir., 48 F. 2d 771. Strangely, that is exactly what appellant contends—that he was entitled to have the question of his innocent or felonious intent submitted to the jury, and the government agrees that felonious intent is an element of the crime charged against Morissette, when it argues that the district court was correct in holding that felonious intent was "presumed by his (Morissette's) own act." Thus, while it argues that the "*animus furandi* must accompany the taking to constitute 'larceny,' " it contends that here "the wrongful taking of property in itself imports the *animus furandi*."

At common law, the *animus furandi*, or specific intent to steal, is an essential element of the crime of larceny. *Ryan* v. *United States*, 26 App. D. C. 74. Where a crime consists of an act, combined with a specific intent, the intent is just as much an element of the crime as is the

act. In such cases, mere general malice or criminal intent is insufficient, and the requisite specific intent must be shown as a matter of fact, either by direct or circumstantial evidence. *Savitt* v. *United States*, 3 Cir., 59 F. 2d 541. Proof of the commission of an unlawful act does not warrant the presumption that the accused had the requisite specific intent. *United States* v. *Hughes*, 278 F. 262. Where a statute (18 U. S. C. A., Section 87) provided that anyone who should steal, embezzle, or knowingly apply to his own use property furnished to or to be used by the armed services, was guilty of a crime, and a person purchased property furnished for the armed services from a soldier at a price disproportionate to its value, it was held that such a purchase, when considered with other evidence, supported an inference of "guilty knowledge" on the part of the purchaser, "i. e., that he did 'knowingly apply to his own use' property of the United States; *that while so doing he knew the property was stolen.*" (Emphasis supplied.) *Adolfson* v. *United States*, 9 Cir., 159 F. (2d) 883. In passing upon the question of proving such guilty knowledge by all the surrounding facts and circumstances, the court said: "We regard this evidence as relevant and competent for the purpose of showing the charged 'guilty knowledge' as a *fact*. This because the existence of this 'knowledge' of the character and value of the property was a material and necessary element in the prosecution's chain of evidence and it was therefore proper to submit it to the jury on the question of whether or not this guilty knowledge existed and was proven beyond a reasonable doubt." "The color of the act determines the complexion of the intent only in those situations where common experience has found a reliable correlation between a particular act and a corresponding intent." *Hubbard* v. *United States*, 9 Cir., 79 F. (2d) 850, 853. While a person is presumed to intend to do that which he does, and especially so when the things are done in the commission of a crime, nevertheless, such a presumption does not exist where specific intent must be proved as a necessary element of the offense. If it appears that a taking of property was

consistent with honest conduct, although the party charged with the crime may have been mistaken, he can not be convicted of larceny. *Flint* v. *State*, 143 Fla. 259, 196 So. 619.

Every taking of another's property without legal justification is a trespass upon the owner's right to its continued possession, but it does not constitute a crime of larceny unless the act is perpetrated feloniously, that is, *animo furandi*, or with the intention to steal. *Johnson* v. *State*, 73 Ala. 523; *Rountree, et al.* v. *State*, 58 Ala. 381. An essential element of larceny is that the property of another, which is taken away without his consent, should be taken with a felonious intent. The crime implies theft, and one can not be deemed guilty of larceny, without felonious intent to deprive the owner of his property; and such intent must be proved. *United States* v. *One 1941 Chrysler Brougham Sedan*, D. C. Mich., 74 F. Supp. 970.

In *Landen* v. *United States*, 6 Cir. 299 F. 75, 78, 79, it is said: "The principle that even a mistake of law may protect one accused of crime has familiar illustration in the rule that, if the respondent in a prosecution for larceny took the property in a goodfaith, though erroneous, belief that he had the legal right to its possession, he is not guilty."

In *Hargrove* v. *United States*, 5 Cir., 67 F. (2d) 820, the court had occasion to review instruction to a jury in a criminal case in which the trial court had charged that the question of wilfullness and intent depended upon whether it found that the defendant wilfully and knowingly did what he intended to do; and that while a man might have no intention to violate the law, yet if he wilfully and knowingly did a thing which constituted a violation of the law, he violated the law. On appeal, these instructions were held erroneous and the judgment was reversed in an opinion in which it was said: "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first

class of cases, . . . the law imputes the intent. . . . Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence. . . . For this error the judgment is reversed. . . ." Pages 823, 824.

The general rule that a criminal intention will be presumed from the commission of the unlawful act does not apply where *scienter* is an element of the crime; and proof of the commission of the act does not warrant the presumption that accused had the requisite specific intent. Felonious intent is not presumed. *Hubbard* v. *United States*, 79 F. (2d) 850.

In *United States* v. *Hughes*, 278 F. 262, 265, where an alien was accused of knowingly circulating printed matter advocating the overthrow, by force or violence, of the government of the United States, the court said: "That statutes creating an offense 'knowingly' committed import knowledge as to all the essential ingredients of the offense is an undoubted and well-recognized rule of construction and a reasonable one. If the mere distribution without further knowledge were sufficient, the word 'knowingly' would be superfluous, as one could not well distribute circulars without knowledge that he was distributing them."

As an instance of evidence of intent, the accused is entitled to introduce any fact which tends to disprove a felonious intent, and his conduct in connection with the act of taking, such as, that he took the property openly in the presence of others, and made no effort to conceal his taking or possession. See *Johnson* v. *State*, 73 Ala. 523. And where the accused has requested a charge that if the taking was open, a presumption arises that there was no felonious intent, it is held that refusal so to charge was error. *Bivins* v. *State*, 24 Ala. App. 373, 135 So. 603; *Floyd, et al.* v. *State*, 23 Ala. App. 216, 123 So. 103.

From the foregoing, we are constrained to hold that the trial court, in the instant case, erred in instructing the jury that felonious intent was presumed from the act

of appellant in taking the casings, and, further, that the fact that he knowingly took them imported intent on his part—specific wrongful intent. The intent of appellant was the crucial point in the case. Whether his intent was innocent or wrongful was a question for the determination of the jury.

In addition to the issue of intent, in this case, there is also the question of abandonment. Abandonment is the intentional relinquishment of a known right to property. *New Jersey Zinc Co.* v. *Signmaster, et al.*, D. C. N. Y., 4 F. Supp. 967. It means virtually throwing the property away; it is a relinquishment of property to which a person is entitled, with no purpose of again claiming it, and without concern as to who may subsequently take possession of it. *Wilmore Coal Co.* v. *Brown, et al.*, 147 F. 931. If an owner throws the property away or voluntarily forsakes it without any intent to repossess it or reclaim it, it becomes abandoned. *Summers* v. *Atchison, T. & S. F. Ry. Co.*, 2 F. (2d) 717; *Helvering* v. *Jones*, 8 Cir., 120 F. (2d) 828; *Equitable Life A. Soc.* v. *Commerce B. & T. Co.*, 8 Cir., 155 F. (2d) 776. It is said that the act of abandonment may be by an overt act or some failure to act which carries the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment. *Landay* v. *MacWilliams*, 173 Md. 460, 196 A. 293, 114 A. L. R. 984. The primary elements of abandonment are the intention to abandon and the external act by which the intention is carried into effect; and the intent to abandon need not appear by express declaration of the party, but may be inferred from the situation of the property. *Log-Owners' Booming Co.* v. *Hubbell*, 135 Mich. 65, 97 N. W. 157. Ordinarily such intent may be ascertained from the acts and conduct of the owner; *City of New London* v. *The Pequot Point Beach Co., et al.*, 112 Conn. 340, 152 A. 136; but whether there has been an intent to abandon and an abandonment is a question of fact to be determined by the jury under all the circumstances of the case. *Kister Oil Development Corp.* v. *Young, et al.*, 27 F. (2d) 433; *Wilmore Coal Co.* v. *Brown, et al., supra; Cadillac Oil &*

Gas Co., v. *Harrison, et al.*, 196 Ky. 290, 244 S. W. 669. It is the exclusive province of the jury to determine the intent with which the accused performed the alleged criminal act relied upon to establish the felonious taking and carrying away of the property, and the accused person may testify as to the intent with which he took the property. *State* v. *Williams*, 95 Mo. 247, 8 S. W. 217.

Where one takes personal property into his possession in the honest belief that it is abandoned by its owner, he is not guilty of larceny. *Johnson* v. *State*, 36 Tex. 375; *Jordan* v. *State*, 107 Tex. Cr. 414, 296 S. W. 585.

There is no reason why the government may not abandon property as well as an individual. The fact that, in taking abandoned property, a trespass is committed upon the land of one who has abandoned it, does not change innocent intent into felonious intent, or alter the fact that the property may have been abandoned. Such a trespass would be a circumstance to which much importance might be attached by the jury in determining the intent with which the property was taken, as well as in determining whether the property had been abandoned. But such a trespass is not conclusive on the question of a wrongful taking. In *Bodee, et al.* v. *State*, 57 N. J. Law 140, 30 A. 681, where the accused was charged with stealing coal from a railroad right-of-way and his defense was that he thought the coal had been abandoned, it was held that testimony was admissible to show a practice of owners of coal on the one hand, and of poor people on the other, with regard to gathering up coal dropped in unloading cars, on the issue whether the owners had abandoned such coal, and whether others who picked it up thought that it was abandoned.

In the instant case, it appears that, in spite of warning signs, the area of the bomb base was used by many hunters for deer hunting. It was a wild place, largely woodland, and was located in the hunting country. The fact that it was leased from the state for the purpose of permitting the dropping of the casings to simulate bombs is not conclusive proof that the government did not abandon the casings after they had been exploded and

cleared off the target area. Of course, it could not reasonably be contended that one who removed property from the home or from the immediate personal possession of another did so in the belief that it was abandoned; nor, in such a case, could one rely upon the claim that it actually had been abandoned; but that is not this case. The question of wrongful or innocent taking, or whether the property was abandoned, must be judged according to the facts of each case.

On the question of abandonment, appellant testified that he removed the casings because he thought they were abandoned. They had been cleared off the range to get them out of the way after they had been used, and were piled up in a heap in the midst of the woods at a considerable distance from the nearest road. They were exposed to the weather and were pretty well rusted out. Some were practically decomposed, and others were in the process of decomposition. Photographs taken of another pile in the woods, which admittedly was similar to the one from which Morissette took the casings, showed a disorderly heap of bent, crushed, and disintegrating metal casings, giving an impression of a deserted pile of disused junk. There seems to have been nothing to indicate to anyone that the casings were to be used again, and the fact that they had been allowed to lie in the open weather for several years might indicate to an ordinary man either that someone in authority was culpable in allowing the casings to decompose, rust away, and become worthless and useless, or that they were considered of no further use or value and had, accordingly, been discarded and thrown away. The evidence submitted by appellant, under the issues in the case, required submission to the jury, not only of appellant's good faith and innocent intent in taking the casings, but also the question whether the property had been abandoned by the government, for even without direct proof of intent to abandon, the jury could, under the circumstances of this case, draw reasonable inferences that the government had intended to, and did, abandon the property. The district court, in my opinion, therefore, erred in refusing to permit the

introduction of evidence of abandonment, and in refusing to submit to the jury for its determination whether the property had been abandoned.

The main issue in the case, however, was whether appellant was entitled to have the jury decide he had taken the property innocently or with felonious intent. In refusing to permit this issue to be decided by the jury, the district court, in my opinion, committed reversible error.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Joseph Edward Morissette* v. *United States of America*, No. 10,974, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 12th day of February, A. D. 1951.

J. W. MENZIES,
Clerk of the United States Court of Appeals for the Sixth Circuit.

(SEAL)

[fol. 94] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 593

ORDER ALLOWING CERTIORARI—Filed May 7, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. ~~592~~ 12

JOSEPH EDWARD MORISSETTE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ANDREW J. TRANSUE,
Counsel for petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 593

JOSEPH EDWARD MORISSETTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Andrew J. Transue, attorney for petitioner, Joseph Edward Morissette, prays that writ of certiorari issue to review the judgment entered in this case on the 5th day of February, 1951, by the United States Court of Appeals for the Sixth Circuit.

Summary and Short Statement of Matter Involved

The petitioner, Joseph Morissette, was born in Flint, August 15, 1921. His father died when he was sixteen years of age and he went to the CC Camp because he had no other means of living at home. His mother died when he was

seventeen. He had never been arrested or convicted of anything except reckless driving before this occurrence. He served as a soldier during World War II and was honorably discharged. He worked at fruit markets and hauled scrap iron and did a little trucking. He had worked at the A. C. Spark Plug Company for four and a half years. He hauls Christmas trees every year. He is married and at the time of the trial had one child six years of age. In the fall of 1948, Joe Morissette, with some other acquaintances, went hunting deer and part of their hunting was on the Oscoda Air Base Range, a thickly wooded part of the State of Michigan and good deer country (R. 30). Petitioner's exhibits one to six are pictures of old bomb cases which look like the ones that petitioner took in broad daylight at about one or two o'clock in the afternoon while eight or ten people passed through there, a couple of cars drove by and one coupe stopped (R. 31). The old bomb cases were loaded on petitioner's truck and taken to his uncle's farm where they lay in plain view of the road and when they finished deer hunting petitioner took a tractor and run over the old bomb cases so he could get a bigger load of other junk. The old bomb cases were reloaded on the truck with the other junk and petitioner started for Flint, a distance of one hundred eighty miles, with it, stopping at a locker plant to pick up the deer his friend Collins had killed. He started in broad daylight in the afternoon. The old bomb cases were in plain view. He stopped to talk to an acquaintance at the junction of roads 171 and 23 (R. 32). He parked his truck on the highway in front of a restaurant. He made no effort to conceal anything, as he didn't think there was any reason for him to conceal anything. He sold the old casings to the Laro Coal Company in Flint, Michigan. A little later on the State Police stopped him when he was on his way down from Cheboygan with Christmas trees. He readily told the State Police all

that had happened (R. 33 and 22 and 23). Later on petitioner heard the FBI wanted to see him and he went down right away and told him freely what had occurred (R. 34 and 24 and 25) and he told the FBI agent that he did not know that these bomb casings were not to be removed from where they were. The old bomb cases were piled up from 1944 and had been exposed to the weather. They were pretty well rusted out, some of them so rusted that they are practically decomposed and some of them are in the process of decomposition (R. 15). The foregoing is also shown by pictures offered as exhibits and identified at the trial.

The following indictment was filed May 12, 1949.

The Grand Jury charges:

That on or about the 2nd day of December, A. D., 1948, at Oscoda, Michigan, in the Eastern District of Michigan, Northern Division, Joseph Edward Morissette, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18 (R. 3 and 4).

A jury trial was had in the District Court for the Eastern District of Michigan, Northern Division, Honorable Frank A. Picard, District Judge, presiding, commencing on June 13 and 14, 1949. Verdict was entered on June 14, 1949, finding the petitioner guilty of the charge in said indictment contained (R. 55 and 56).

The only issue was the claim of the petitioner on the trial that the old bomb cases had been abandoned and he had no felonious intent in taking them and converting them to his use. The District Judge would not allow this issue to be argued or presented to the jury and refused petitioner's

request to charge as to the necessity of felonious intent and in regard to abandonment. The court, in its charge, said:

> "Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. But if you follow the instruction of the court, you have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty" (R. 52 and 53).

The Court further said in the presence of the jury:

> "The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty" (R. 53).

The same issues were presented to the Sixth Circuit Court of Appeals for the Sixth Circuit before Allen, Martin and McAllister, Circuit Judges. Martin, Circuit Judge, wrote the majority opinion and held that the Court's charge was correct and that the element of felonious intent and of abandonment were not in the case or necessary for conviction under Section 641, Title 18, United States Code. McAllister, Circuit Judge, dissented and wrote a dissenting opinion to the effect that felonious intent is a question for the jury under this section of the statute and that the question of abandonment was raised by the testimony in this case and should have been submitted to the jury with proper instructions.

Statement Particularly Disclosing the Basis upon Which It Is Contended the Supreme Court Has Jurisdiction to Review the Judgment of the Sixth Circuit Court of Appeals in Affirming the Judgment and Conviction of the Petitioner.

1. Federal Rules of Criminal Procedure, rule 37, b2. The judgment of the Circuit Court of Appeals for the Sixth Circuit was dated February 5, 1951.

2. Section 1254, Title 28, United States Code:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *

Section 641, Title 18, United States Code, is a part of chapter 31 of the code of criminal procedure entitled embezzlement and theft and is as follows:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725."

The Question Presented

1. Is a felonious intent a necessary ingredient of the crime charged against the petitioner under the foregoing statute, Section 641, Title 18, United States Code.

2. Should the petitioner's requested instructions on abandonment been given to the jury by the trial court.

3. Should petitioner's instruction to the effect that the taking was open and notorious, showing an absence of felonious intent had been given.

4. Did the trial court direct a verdict of guilty and if it is not a direct verdict of guilty, is it so argumentative and biased as to constitute reversible error.

Reasons for Granting the Writ

Section 641, Title 18, United States Code, under which the indictment against petitioner was brought and a verdict of guilty rendered by the jury consolidates Sections 82, 87, 100 and 101 of Title 18, United States Code, 1940 edition. The indictment in this case charges that petitioner did unlawfully, wilfully and knowingly steal and convert to his own use, property of the United States. Practically the same language is found in Section 87 of Title 18, United States Code, 1940 edition. The cases under Section 87 show that a felonious intent or guilty knowledge is an ingredient of the crime of converting property to the use of the person charged. *Adolfson* v. *U. S.*, C. C. A. Cal. 1947, 159 F. 2d 883. *U. S.* v. *Trinder*, D. C. Mont. 1932, 1 F. Supp. 659. *Tredwell* v. *U. S.*, 266 F. 350

A thorough search has been made and the decision of the Circuit Court of Appeals in this case is the only one that can be found construing Section 641, Title 18, United States Code, and it is the only case either before the consolidation of Sections 82, 87, 100 and 101 of Title 18, 1940 edition, or

the new section holding that felonious intent is not an element of the crimes denounced by the statutes. This decision is in conflict with all of the decisions of the Circuit Courts of Appeals prior to the consolidation and is the only decision since consolidation. The decision in this case is in conflict with applicable decisions of this court and, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Since the questions presented are of general importance and since the decision below conflicts with other decisions, a construction of Section 641, of Title 18, United States Code, is important and since the decision below conflicts with all prior decisions of the statute before consolidation and since this is the only decision construing Section 641 since its enactment and since it is a decision by a divided court and there is a strong opinion of dissent in this case, the petition for writ of certiorari should be granted. And since petitioner believes that the intent with which he took the bomb cases is the heart of this case, the pictures showing the ones that remain, which are petitioner's exhibits one to six, inclusive, in this case, now in the custody of the Circuit Court of Appeals, are worth more than words to determine whether a substantial question is involved. Petitioner prays that these pictures be brought up to this court to aid the court in determining whether the writ will be granted.

Respectfully submitted,

ANDREW J. TRANSUE,
Attorney for Petitioner,
303 Dryden Building,
Flint, Genesee County, Michigan.

Dated: March 5, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 593

JOSEPH EDWARD MORISSETTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

The verdict of guilty, as charged in the indictment contained, convicted petitioner, Joseph Edward Morissette, of unlawfully, wilfully and knowingly stealing and converting to his own use, property of the United States.

The indictment, as brought under section 641 of Title 18, United States Code, which provides:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or Whoever, receives, conceals, or retains the same with

intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725."

Petitioner contends that in order to constitute a crime there must have been a felonious intent in his mind at the time he took the bomb cases and converted them to his own use. The District Judge and the majority opinion of the Circuit Court of Appeals held that the element of felonious or evil intent is not necessary to be guilty of the crime charged. The trial court and the Circuit Court of Appeals in the majority opinion further held that the issue of abandonment had not been raised and that the state of petitioner's mind in regard to whether the property had been abandoned made no difference and that the petitioner would be guilty of the crime charged if he took the property believing it to be abandoned and took it without any felonious or evil intent.

Petitioner believes the question raised by this appeal is an important one as Section 641 is a consolidation of Sections 82, 87, 100 and 101 of Title 18, United States Code, 1940 edition, and as all of the cases brought under the consolidated sections show felonious intent, an evil intent, dishonest intent, is an element of the crimes denounced by these sections and this is the first case so far as petitioner can ascertain after careful search, construing Section 641, Title 18, United States Code.

Section 82 of Title 18, United States Code, 1940 edition, provides:

> "Whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

A felonious intent is part of the crime denounced under Section 82 quoted above. *U. S.* v. *Trinder*, 1 Fed. Supp. 659; *U. S.* v. *Anderson*, D. C., Cal. 1942, 45 Fed. Supp. 943.

Section 87 of Title 18, United States Code, 1940 edition, provides:

> "Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in sections 80 and 82 to 86 of this title."

In the case of *Adolfson* v. *U. S.*, C. C. A., Cal., 1947, 159 Fed. (2d) 883, prosecution was had under Section 87, Title 18, United States Code, 1940 edition, for knowingly applying to his use property furnished or to be used for the military or naval service, and it was held in this case that knowledge on the part of the accused that the property was stolen was an ingredient of the offense charged under Section 87. The decision holds that guilty knowledge is a part of the offense.

Martin, Circuit Judge, in writing the majority opinion in this case, cited the *Adolfson* case in support of the majority decision and opinion. The *Adolfson* case does hold

that unlawfully, wilfully and knowingly applying to their own use property of the United States is an offense under section 87, however, the case also holds that guilty knowledge is an ingredient of the offense. This is shown by McAllister, Circuit Judge, in the dissenting opinion shown on page 87 of the record.

Bone, Circuit Judge, delivered the opinion in the *Adolfson* case and stated as follows:

> "The 'guilty knowledge,' if it existed, necessarily had to be and could be shown by all the surrounding facts and circumstances. To establish this claimed guilty knowledge as a relevant and material fact, the prosecution introduced evidence showing appellant's acts and statements at the time of the purchase, which it claimed revealed a clear intention and purpose to accomplish the unlawful acts charged in the indictment. We regard this evidence as relevant and competent for the purpose of showing the charged 'guilty knowledge' as a fact. This because the existence of this 'knowledge' of the character and value of the property was a material and necessary element in the prosecution's chain of evidence, and it was therefore proper to submit it to the jury on the question of whether or not this guilty knowledge existed and was proven beyond a reasonable doubt."

The *Adolfson* case is the only case that I have found which charges unlawfully, wilfully and knowingly applying to their own use property of the United States. It makes guilty knowledge an ingredient of the offense. The decision in the *Adolfson* case is in conflict with the decision in this case in that guilty knowledge was required in the *Adolfson* case and it is not required under the majority opinion in this case. Moreover, in this case petitioner was charged with stealing as well as knowingly converting to his own use, property of the United States.

Section 100 of Title 18, United States Code, 1940 edition, provides:

> "Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

In the case of *Crabb* v. *Zerbst*, 99 Fed. 2d, 562, consideration was given to the above section and the words steal or purloin as used in the section are discussed. The court said:

> "Larceny is hedged about by its common-law definition. Embezzlement must be considered to have its classical meaning and to stand at the opposite extreme of the offenses dealt with in these two sections. Between them there lies a gap which has grown wider and wider as the multifarious activities of the central government have spread and increased. Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership."

The above shows that a dishonest intent, felonious intent, or evil intent is an ingredient of Section 100, Title 18, United States Code, 1940 edition.

Section 101 of Title 18, United States Code, 1940 edition, provides:

> "Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the

same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender."

Lewis v. *Hudspeth*, 103 Fed. Rep. 2d Series, 23, the court there said:

"Said Section 101, Title 18, U. S. C. A., includes two distinct offenses. To convict the accused on the first count of feloniously retaining the possession of the stolen property, it was not necessary to prove that the accused knew the property was stolen at the time he received it, it being sufficient to establish that he retained it knowing of its stolen character. To convict under the second count, it was essential to prove that the accused received and concealed the property, knowing the same was stolen at the time he received and concealed same."

The above shows that guilty knowledge, felonious intent, dishonest purpose was an ingredient of the crime charged under this section.

The foregoing sections were consolidated in Section 641 of Title 18, United States Code by H. R. 3190, an act to revise, codify, and enact into positive law, Title 18 of the United States Code, entitled "Crimes and Criminal Procedure."

Section 641 of Title 18, United States Code, is the first section in chapter 31 of the code of Crimes and Criminal procedure. This chapter is entitled Embezzlement and theft. The section 641 has been quoted at the beginning of this brief. The reviser's notes are as follows:

"Section consolidates sections 82, 87, 100, and 101 of title 18 U. S. C., 1940 ed. Changes necessary to effect the consolidation were made. Words 'or shall willfully injure or commit any depredation against' were

taken from said section 82 so as to confine it to embezzlement or theft.

The quoted language, rephrased in the present tense, appears in section 1361 of this title.

Words 'in a jail' which followed 'imprisonment' and preceded 'for not more than one year' in said section 82, were omitted. (See reviser's note under section 1 of this title.)

Language relating to receiving stolen property is from said section 101.

Words 'or aid in concealing' were omitted as unnecessary in view of definitive section 2 of this title. Procedural language at end of said section 101 'and such person may be tried either before or after the conviction of the principal offender' were transferred to and rephrased in section 3435 of this title.

Words 'or any corporation in which the United States of America is a stockholder' in said section 82 were omitted as unnecessary in view of definition of 'agency' in section 6 of this title. The provisions for fine of not more than $1,000 or imprisonment of not more than 1 year for an offense involving $100 or less and for fine of not more than $10,000 or imprisonment of not more than 10 years, or both, for an offense involving a greater amount were written into this section as more in conformity with the later congressional policy expressed in sections 82 and 87 of title 18, U. S. C., 1940 ed., than the nongraduated penalties of sections 100 and 101 of said title 18.

Since the purchasing power of the dollar is less than it was when $50 was the figure which determined whether larceny was petit larceny or grand larceny, the sum $100 was substituted as more consistent with modern values.

The meaning of 'value' in the last paragraph of the revised section is written to conform with that provided in section 2314 of this title by inserting the words 'fact, par, or.'

This section incorporates the recommendation of Paul W. Hyatt, president, board of commissioners of

the Idaho State Bar Association, that sections 82 and 100 of title 18, U. S. C., 1940 ed., be combined and simplified.

Also, with respect to section 101 of title 18, U. S. C., 1940 ed., this section meets the suggestion of P. F. Herrick, United States attorney for Puerto Rico, that the punishment provision of said section be amended to make the offense a misdemeanor where the amount involved is $50 or less.

Changes were made in phraseology."

The decision of the Circuit Court of Appeals in this case, affirming the holding of the Trial Court to the effect that felonious intent, evil intent, guilty knowledge or the state of mind on the part of the accused, is not an element of the crime charged, is the first decision of a Circuit Court of Appeals construing Section 641, Title 18, U. S. C., and it is in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the case of *Adolfson* v. *U. S.*, 159 Fed. 2d, 883, where Section 87 of Title 18, U. S. C., 1940 ed., was before that court and it is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Crabb* v. *Zerbst*, 99 Fed. 2d, 562, where that court had before it Section 100 U. S. C., 1940 ed. It is in conflict with all of the previous decisions construing the sections that were consolidated into section 641 and, as this is the first decision of a Circuit Court of Appeals construing section 641, title 18, U. S. C., an important question of federal law has not been, but should be, settled by this court. It is further submitted that the decision of the Sixth Circuit Court of Appeals in this case is in conflict with the applicable decisions of this court and this decision has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this court's power of supervision.

The verdict in this case convicting the petitioner of the crime charged in the indictment convicted him of unlaw-

fully, willfully and knowingly stealing and converting to his own use property of the United States, citing *Statler* v. *U. S.*, 157 U. S. 277, 39 Law. Ed. 700, Mr. Justice White delivered the opinion of the court and said:

"So likewise a general finding of guilty will be interpreted as guilty of all that the indictment well alleges."

22 *C. J. S.*, Section 30, states:

"By the express terms of a statute guilty knowledge is sometimes made an essential ingredient of the offense, as where it requires the act to be done 'knowingly,' etc. On the other hand, the legislature may forbid the doing of or the failure to do an act and make its commission or omission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, and in such cases, the doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt; such legislation is enacted and is sustained, for the most part, on grounds of necessity, and is not violative of the federal constitution. However, it has been stated that the police power of the state is not without limitations, and that a penal law will not be valid where it makes criminal an act which the utmost care and circumspection would not enable one to avoid; nor can such power be exercised to the extent of preventing one accused of crime from invoking the defense of insanity.

Whether or not criminal intent or knowledge is an element of a statutory crime is a matter of statutory construction to be determined in a given case by considering the subject matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the legislature. As a general rule, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be re-

garded as essential, even when not in terms required, especially in the case of crimes involving moral turpitude. A 'criminal mind' is not an element of the offense in the case of statutory crimes not involving moral turpitude passed in aid of the police power of the state, where the word 'knowingly' or other apt words are not employed to indicate that knowledge or intent is an essential element of the crime charged; but the absence of such words is not conclusive as to the legislature's intention. Whether or not a criminal intent is necessary in the case of specific statutory crimes is discussed in the particular crimes titles in this work.

Whatever may be the true construction of the statute, when, with a knowledge of all the facts, one deliberately violates a positive law which he is presumed to know, he cannot be excused on the ground that he intended no wrong; but the rule applies only to unlawful acts which are voluntarily, and in that sense intentially, done."

The dissenting opinion in this case by McAllister, Circuit Judge, sets forth the position of the petitioner in this case. The dissenting opinion discusses scienter. The meaning of willfully and knowingly when used in criminal statutes. The history and background of this statute and shows that felonious intent is an ingredient of the crime charged in the indictment of which the petitioner was convicted and that the same should have been submitted as an issue to be decided by the jury. The dissenting opinion also shows that the issue of abandonment should have been submitted to the jury. The dissenting opinion is a strong argument for the granting of the writ of certiorari in this case and reference is made to the dissenting opinion and the decisions therein cited that consideration of the dissenting opinion will be had in determining whether or not the writ will issue. The majority opinion rules out felonious intent as an ingredient of the crime charged and says that the

statute is violated when a person knowingly converts to his own use government property. The opinion of the trial court on petitioner's motion for a new trial was not included in the record and probably should have been. I am taking the liberty to set forth the opinion of the trial court on petitioner's motion for a new trial as an argument for the granting of the writ of certiorari under that part of rule 38 that the trial court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

UNITED STATES OF AMERICA, IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

No. 4469

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH EDWARD MORISSETTE,

Defendant

OPINION OF THE COURT

The motion of defendant for a new trial in the above matter is hereby denied.

This is a question of statutory construction and in order to arrive at a conclusion it is necessary to know that the defendant was charged with violation of Section 641, Title 18 of U. S. C. which reads as follows:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;"

The Reviser's notes indicate that this section is a combination of former sections 82, 87, 100 and 101 of Title 18 of the Code.

In Section 82 the words used are

"with *intent* to *steal* or *purloin*,"

In Section 87 the words are

> "whoever shall *steal, embezzle, or knowingly apply to his own use*"

The words used in Section 100 are

> "whoever shall *embezzle, steal* or *purloin* any money, property . . ."

And in Section 101

> "whoever shall *receive, conceal,* or *aid in concealing*" etc. (Emphasis ours.)

It is well to note the exact words of Section 641. The word "Steal" is used and the common law definition of larceny does not apply. The word "steal" has no common law definition

> "to restrict its meaning as an offense and is commonly used to denote any dishonest transaction, whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership." It does not necessarily mean "purloin."

See *Crabb* v. *Zerbst*, 99 F. 2d 562.

First, it was evidently the intent of Congress that it was not necessary that this man or any other knowingly do the criminal act encompassed by Section 641. Stealing itself presumes a criminal intent and there is no expressed requirement of intent in the statutory offense.

The second reason for denial of defendant's motion is that intent can be presumed from the act itself but the court did submit to the jury the question of whether this man intended to take property that didn't belong to him.

Our third reason is that no real issue of abandonment was raised by the evidence. The claim of abandonment was too specious to be submitted to a jury.

While intent is generally required by the criminal law it is not a requirement of this provision as we interpret it under our statutory construction.

FRANK A. PICARD,
United States District Judge.

Dated: August 1, 1949.

Volume 34, No. 5, February, 1951, *Journal of the American Judicature Society*, has an editorial "Justice and Righteousness" founded on a text from Amos 5:24

> Let judgment roll down as waters, and righteousness as a mighty stream.

The following, taken from St. Matthew, 15:19, 20 also appears to me to be in point:

> For out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, blasphemies:
>
> These are the things which defile a man: but to eat with unwashen hands defileth not a man.

It is respectfully submitted that the case here is an important one to Joseph Morissette, the petitioner, and to all of the citizens of the United States. It is recognized that there are cases such as *U. S.* v. *Balint*, 258 U. S. 250, where intent is not involved. However, it is respectfully submitted guilty knowledge, dishonest purpose, evil intent is necessary under Section 641, Title 18, U. S. C. in order to convict petitioner of being a thief as he now stands convicted and it is therefore respectfully submitted that petitioner's application for a writ should be granted.

Dated: March 5, 1951.

ANDREW J. TRANSUE,
Attorney for Petitioner,
303 Dryden Building,
Flint, Genesee County, Michigan.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 12

JOSEPH EDWARD MORISSETTE,
Petitioner,

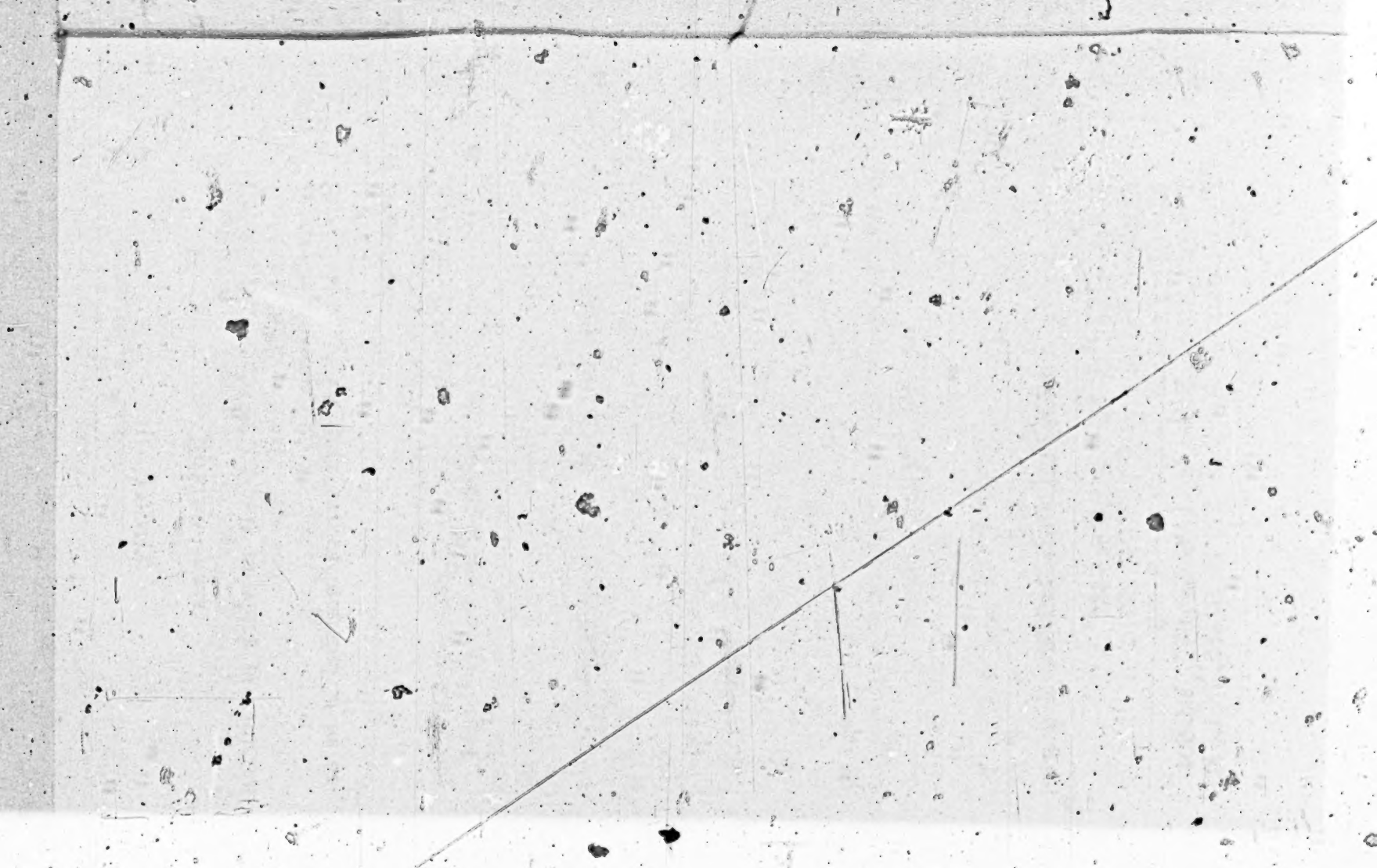
vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF

ANDREW J. TRANSUE,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 12

JOSEPH EDWARD MORISSETTE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF

Concise Statement of Grounds on Which Jurisdiction of the Supreme Court Is Invoked

Section 1254, Title 28, United States Code. A writ of certiorari was granted on petitioner's application as provided in this section.

A Concise Statement of the Case

Joseph Edward Morissette was born August 15, 1921 (R. 27). When he was fifteen years old his father died

(R. 27). Shortly after his father passed away he went to the CC Camp because he had no other means of living (R. 27). While he was at the CC Camp his mother died (R. 27). Joe was working at the A. C. Spark Plug Factory when he went in the Army (R. 27). He was honorably discharged from the United States Army in February, 1944, and went back to the A. C. Spark Plug Company to work (R. 27). He left the Spark Plug Company and went into the fruit market business (R. 27). He also hauled Christmas trees from Northern Michigan every year (R. 27) (R. 31). He had been buying junk off and on for three and a half, maybe four, years and went pretty near all over Michigan. He went up through the Thumb, around Port Huron, Bad Axe and up as far as Marquette above the Straits and over in Lansing once in a while. This was generally in the winter months as in the summer months he ran a fruit business (R. 31).

During the summer of 1947 he operated a fruit stand at the Junction of Highway 171 and 23 "the Dixie Highway" (R. 30) (R. 31). This is about a mile north of the City limits of Oscoda. During this summer he also wholesaled fruit to stores and restaurants all the way from Pinconning to Alpena (R. 30) (R. 31). When Joe was nineteen years old he was married and he had one son six years of age (R. 27). He was in the fruit business located at G 5010 North Saginaw Road just outside of the City limits of Flint and was living with his wife and six year old boy in a trailer placed in the back of his uncle's home at 5117 Horton Avenue (R. 27). Joe had been hunting deer in Northern Michigan and on the Oscoda Bombing base for the last three years (R. 31). He had observed old tins (R. 28) and had known previously that the old bomb casings were on the range, but he went there to hunt deer (R. 32). From the appearance of this junk out there in the woods he thought it had been thrown away because it was rotting

(R. 34). It was rusted right out and he thought it had been abandoned (R. 35). The used bomb casings were piled on the edge of the cleared out range (R. 8) about a half mile from the traveled road and twenty-four miles by road of the headquarters of the bombing base (R. 12). This was about twelve miles by air (R. 12). In a heavy wooded section. Just general deer hunting country like the rest of it up there (R. 13).

The pictures, Exhibits one to six, are pictures of spent bomb casings (R. 9). The pictures were taken on the Oscoda base gunnery range in June, 1949 (R. 9) (R. 10) and (R. 4). Exhibit one is a picture close up of the spent bomb casings (R. 9) (R. 10). The bomb casings are piled up to decontaminate the target area (R. 8). They clear all the spent bomb casings off and pile them up (R. 8). They were not salvaged because of possible danger. There is a danger if the black powder has not exploded. When the bomb drops it will in some cases not explode (R. 8) (R. 9). The bomb casings were stacked up there beginning in at least 1944 (R. 13) (R. 14). Captain Askelson, who was the commanding officer at the Oscoda Air Base (R. 7) and had knowledge of the base since 1940 and was stationed at the base since 1944, (R. 13) gave the following information:

Q. So far as you know they have been collecting these things together up there and piling them up since at least 1944?

A. Yes.

Q. And they have been out there and exposed to the weather, are they?

A. Yes.

Q. Are they rusted, the ones we saw?

A. Yes.

Q. They are pretty well rusted out, aren't they?

A. They are rusted, yes.

Q. Some of them so rusted that they are practically decomposed, isn't that right, Captain?

A. I guess so.

Q. And the rest of them are in the process of decomposition?

A. Yes (R. 14).

Exhibit one is a close up of one of the piles from which Joe Morissette took some of the old bomb cases and the ones he took are like the ones that are still there (R. 9) (R. 28) and (R. 29). Exhibit two is a close up picture of what is left of a pile from which he took something and the ones he took looked exactly like the ones that remain there (R. 9) (R. 28). Exhibit three and six are pictures of a pile that Joe didn't see until the pictures were taken (R. 9) (R. 28). Exhibit four is a picture of two piles from another view from which Joe got some of the bomb cases (R. 9) (R. 28). Exhibit five is a picture of two piles that are right close together and Joe took some from each pile. The ones he took are just about like the ones that are left (R. 9) (R. 28).

Joe had a Studebaker, 1948 stake truck (R. 28). Pat Collins, Mr. and Mrs. Cineski and some others went with Joe to Drummond Island to hunt deer in the fall of 1948 (R. 28). He came back and hunted at his brother-in-law's, Marvin Atchison, place for the second week (R. 28) (R. 18). Joe Morissette, Marvin Atchison and Pat Collins were hunting on the Oscoda bomb base (R. 28). The bomb base is very good deer country (R. 28). Pat had got a deer up at Drummond Island (R. 28). When they were hunting they saw these old tins that were expended bombs (R. 28). Joe did not get a deer so he decided to make his hunting trip pay by loading up his truck with these old bomb casings (R. 22). Marvin Atchison, his brother-in-law, helped him load about three tons of the bomb casings onto his truck (R. 28). It was in broad daylight when he took them out

of there about one or two o'clock in the afternoon. About eight or ten people passed through there while they were taking them. A couple of cars drove by and a coupe stopped and talked (R. 29). There were deer hunters came past them while they were getting these things. Marvin Atchison remembered that three cars stopped while they were loading them (R. 18) (R. 19). They took them out to Alger Anderson's farm, that is Marvin's uncle, and unloaded the bomb casings there (R. 22). They drove the truck through Mikado, got gas, and drove over to the farm (R. 19). At another place they stopped at one of their neighbors who had some scrap iron to sell and Joe bought that. They took it over to the farm and unloaded it right in the field in plain sight, about ten rods from the road. You could see it from the road in plain sight. It lay out there close to a week. Marvin Atchison took the tractor and backed over it for Joe to smash it down so that he could load it with other stuff he got and make it more compact (R. 19) (R. 29). The old bomb cases were left in plain view of the road until they finished up deer hunting and when they had some spare time they took the tractor and run over it (R. 29). This was so that Joe could get on some of his other junk, some of his steel and stuff (R. 29). Joe hired a couple of kids to help him load the truck (R. 29). Pat Collins had stored his deer at the plant locker over by the air base (R. 29). Joe got loaded up (R. 29) and started out from the farm about one-thirty or two o'clock in the afternoon (R. 34). He went over to the locker and got the deer (R. 29) and put the deer on the cab of the truck (R. 33). Joe had put the steel on the bottom of the truck (R. 32). Then he put three tons of the old bomb casings on top, out in plain sight so everybody could see them (R. 32). He didn't put anything over the bomb cases to hold them in the rack (R. 33). He drove from the locker down 171 in broad daylight right in the after-

noon. He had an army stake body on his truck, open, and these old bomb casings were right in plain view (R. 29). At the junction of 171 and Highway 23 John V. Wagner, who lives at Oscoda and got acquainted with Joe Morissette when he operated a fruit stand at the junction of 171 and 23, (R. 16) came by in his truck and flagged Joe down. Joe stopped and Wagner came back and talked to him (R. 30). He told Joe that he had some scrap at his place that he wanted him to sell and wanted Joe to pick it up (R. 30). Joe told him he couldn't take it then, but would come back and maybe take it back on the next load (R. 30). Wagner asked what he had on and Joe told him some old bomb casings. Joe talked to Wagner five or ten minutes (R. 30). While Joe was stopped there Leo Edward May, who lives at Oscoda and is seventeen years of age and had seen the bomb casings out on the bombing range, saw them on the red Studebaker truck at the junction of 171 and U. S. 23 (R. 5). In the scrap drive for the Department of Commerce and Agriculture Leo May had tried to get these old bomb casings and couldn't get them and wondered how anybody else could get them when they couldn't. When he saw them they were on the red Studebaker truck. It was parked off on the side of the road and there Joe was talking to a man (R. 5). Leo was on the school bus going home and he went home and told his father. After talking to Mr. Wagner Joe Morissette drove on down the Dixie Highway (R. 30) and next stopped to get a sandwich (R. 30). He parked his truck right there on the highway up in front of the restaurant in broad daylight. He made no effort to conceal anything. He didn't think there was any reason for him to conceal anything (R. 30). This was on the 2nd of December, 1948 (R. 42). He took about seven ton of other stuff and three ton of that there stuff (R. 31) and took it to Joe Laro's Coal and Iron Company at 6301 North Dort Highway in Flint, Michi-

gan. He was paid about Eighty-five ($85.00) Dollars for his load (R. 22) (R. 23). He knew the bomb casings were at one time United States Government property, but he did not know if they were when he took them and he did not know that these bomb casings were not to be removed from where they were (R. 23).

A little while after he sold the load he was up north to Cheboygan and bought some Christmas trees and the State Police stopped him. This was on December 10, 1948, south of Tawas City on U. S. 23 (R. 20). The State Policeman, Howard Smith (R. 19) told of stopping Mr. Morissette. The State Policeman said I believe we asked him for his operator's license first and asked him if he would come back in the patrol car so we could talk to him. The State Policeman said that Mr. Morissette did this readily and answered all his questions frankly and freely, without any hesitation on his part. The State Policeman said he asked Joe Morissette if he had taken some bomb casings from the air base and that Joe Morissette told him that he had and had taken them to Flint where he had sold them for Twenty-eight ($28.00) Dollars a ton and that Joe told him he had a little over three ton on the truck as he remembered it. The State Policeman asked him if he had permission to take them and Joe said he didn't, that Joe told him that he didn't think the old bomb casings were any good and didn't think anybody would care if they were hauled away (R. 20).

A little later on Joe Morissette heard the FBI man wanted to see him and he went down the next day after he knew the FBI man wanted to see him (R. 31). Joe Morissette went to the FBI office at Flint, Michigan, and the FBI agent was busy on another matter so about half an hour later Mr. Morissette went back again (R. 21). Mr. Morissette furnished the FBI with a statement and signed it (R. 21) (R. 22) (R. 23). In this statement Joe Morissette stated

that he had known about the bomb casings previously, but that he went to the bomb range to hunt deer (R. 22) and he said he knew the bomb cases were one time United States Government property, but he did not know if they were when he took them and he said that he did not know that the bomb casings were not to be removed from where they were (R. 23). This statement was made on January 20, 1949 (R. 23).

On May 12, 1949, an indictment was returned by the Grand Jury (R. 3). The Grand Jury charges:

> "That on or about the 2nd day of December, A. D., 1948, at Oscoda, Michigan, in the Eastern District of Michigan, Northern Division, Joseph Edward Morissette, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18.
>
> A true bill.
>
> Alfred Grueber, Foreman.
>
> Edward T. Kane, United States Attorney, by Janet E. Kinnane, Assistant U. S. Attorney." (R. 3).

Trial was had before the Honorable Frank A. Picard, District Judge, at Bay City, Michigan, on June 13, and 14, 1949 (R. 4). Motion was made to quash the indictment because it did not charge felonious intent and the Court said he would go ahead and hold it in abeyance and if the government doesn't produce any authority tomorrow morning the case will be dismissed (R. 5). The Court gave counsel fifteen minutes a side to argue to the jury and excused the jury for the purpose of telling counsel what they could argue on and what they couldn't argue on (R. 41). The Court said that he did not believe the defendant's request

to charge (R. 50) was the law and that he was not going to permit defendant's counsel to argue this to the jury that this man can go on somebody else's property, take property, and then go away and say, "I thought they abandoned it.", (R. 42). The trial court said he took it because he thought it was abandoned and he knew he was on governn ent property. His counsel said, "That is it exactly, Judge. He took it because he thought it was abandoned." (R. 43). The Court said, "That is no defense. I won't permit you to argue it to the jury and if I am wrong I am wrong, if that is the law of the United States." (R. 44). At this time the counsel said, "That if Joe Morissette, when he picked those things up, thought nobody wanted them, it would be like junk that would be alongside the road. It is the state of his mind at the time. You have to have a state of mind to be a thief." (R. 44). The Court said, "The state of his mind was to take something that didn't belong to him, and there is the intent. If I am wrong, I am wrong (R. 44). I will not permit you to show this man thought it was abandoned. If that is the law I want a higher court than I am to say so." (R. 44).

The trial court, in its charge to the jury, said: "The defense that they sought to introduce here was that he thought it was abandoned property. And I instruct you that there are some instances where a person can take property that appears to be abandoned, and take it and really be guilty of no criminal offense. And this court permitted all the testimony to go in. But when it comes to the time of instructing the jury, I must instruct you that in this case there is no evidence of abandoned property. Abandoned means absolute relinquishment, including both the intent to abandon, and the external act by which the intention is carried into effect. And when the evidence is such as to raise the issue, abandonment is a question for the jury.

But ladies and gentlemen, I hold in this case that there is no question of abandoned property. In the first place, this man knew that he was on government property. He knew it was the bombing range. Whether he knew it or not is immaterial. The bomb shells were on somebody's property and they didn't belong to him. In every crime there must be an intent to do the thing that the person does. For example, if you walk away with a thousand dollars in your pocket that you don't know is there, you hadn't intended to steal that thousand dollars at all. There is no intent. But the question is here. Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it. (R. 47) * * * He had no right to take this property. He had no right, and it is no defense to claim that it was abandoned, because if was on private property (R. 48). Now, there are cases of abandonment, for example, where sometimes you see an old automobile along the road that somebody has left there, and by the time the vandals get through there isn't very much left, and somebody comes along later on and decides to take a part of that property. It has been left there in the road, in the highway. But if I were to hold according to the theory of the defendant here, that a man can walk on anybody else's farm, or anybody else's property, and pick up something, and do it in the open, and then sell it, and say, 'I thought it was abandoned property and, therefore, I am not guilty,' it would be a most unusual law. That is not the law as I understand it. You may feel the government is to be criticized for leaving that property out there. I don't know whether it should be or not. The government, especially the Armed Forces, do a lot of things in leaving their property out, that you and I don't approve of, but

how do we know what the government intended to do up there? Three thousand pounds of it was sold at somewhere near Eighty-four ($84.00) Dollars. They might have been wating for it to get in such quantity that they could send a freight car up there and take it and sell it, because it might become very valuable. At one time during the last war that kind of junk was valuable. We don't know what may be in the minds of the military officials, and for any man to go up there and take the property, he is committing a wrong under this section of the act. I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty." (R. 49).

The court wanted to know if there were any exceptions to the charge (R. 49). Then defendant's counsel said:

Mr. Transue: Exception, of course.

The Court: Your exception is I should submit to the jury the question of abandonment?

Mr. Transue: Not only the question of abandonment, but also the condition of his mind and the intent that he had at the time that this was removed; that there must have been

a felonious intent in his mind to take it away and not be just a trespass.

The Court: Well, all right. The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty (R. 49).

This was all in the presence of the jury (R. 49). The jury retired.

The Court: Now you may enter the objection.

Mr. Transue: The objection is this, as I understand the court's charge, that the taking is the intent.

The Court: No. I leave the question to them whether he intended to take it. He says he did.

Mr. Transue: But the taking must have been with a felonious intent.

The Court: That is presumed by his own act.

Mr. Transue: That is my exception.

The Court: All right.

Mr. Transue: That the felonious taking cannot be derived just from the taking.

The Court: All right, overruled.

Defendant and petitioner made the following request to charge:

1. "The defendant took the property and sold it. There is no question about that.

The question is: What was in Mr. Morissette's mind at the time he took it? Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.

Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

2. If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized'' (R. 50).

The verdict was guilty of the charge in said indictment contained (R. 51). The judgment and commitment sets forth:

"The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above entitled cause, to-wit: Theft of Government Property'' (R. 52).

Motion was made for a new trial. This was denied (R. 53). The trial court's opinion in regard to a new trial was not included in the record, but was included in the petition for writ of certiorari and the trial court, in its opinion, said: "Stealing itself presumes a criminal intent and there is no expressed requirement of intent in the statutory offense'' (Page 22 of the petition for writ of certiorari).

Specification of Assigned Errors Intended to Be Urged

1. Is a felonious intent a necessary element of the crime charged against the defendant under the foregoing statute, Section 641, Title 18, United States Code.

2. Should the defendant's requested instructions on abandonment been given to the jury by the trial court.

3. Should defendant's requested instruction to the effect that the taking was open and notorious, showing an absence of felonious intent have been given.

4. Did the trial court direct a verdict of guilty and if it is not a direct verdict of guilty, is it so argumentative and biased as to constitute reversible error and did the trial court so far depart from the accepted and usual course of

judicial proceedings as to deny the defendant a trial by jury and due process of law as provided by the United States Constitution.

ARGUMENT

Summary

The defendant contends that he did not have a felonious intent, guilty knowledge, evil state of mind or will to do a wrong against society when he loaded up the rusted old bomb casings and took them from the bombing range. He contends that he thought they were abandoned, that their appearance of being rusted and rotted out was evidence from which he thought they had been abandoned (R. 35). He contends that when the commanding officer of the air base admitted that they had laid in piles for at least four years and were pretty well rusted out so that they were practically decomposed and that the rest of them were in the process of decomposition and that he had never obtained any authority to do anything else with them (R. 8) that this, together with their location twenty-four miles out in the deep woods (R. 6) just general deer country (R. 13), was evidence that the government had, in fact, abandoned them and thrown them away (R. 14). He contends that there was a question for the jury on the issue of abandonment and in his belief that they, the old bomb casings, had been abandoned. He contends that his taking them in the open when other deer hunters were going past in broad daylight and talking to them while he was loading them up, transporting them in broad daylight to a Village, then to another farm and then to his wife's uncle's farm and putting them in the field in view of the road, smashing them down with a tractor, loading them again with other junk and taking them in broad daylight down the Dixie Highway, stopping to eat and parking as

well as talking to a man who stopped him, telling the State Police about it when he was asked freely and fully and to the FBI, shows that he had an absence of any evil intent or feeling of having wronged society and the instruction requested to show that his actions along this line raised a strong presumption that there was no felonious intent and that such a presumption had to be repelled by clear and convincing evidence before the jury could convict, should have been given. He contends that felonious intent is an ingredient of the crime charged in the indictment against him and denounced by the statute Section 641 of Title 18, United States Code, under which it was founded. He further contends that regardless of the meaning of the words of the statute and in the indictment "knowingly converts to his own use" that he is charged with stealing, was convicted of stealing and theft and that felonious intent is involved in stealing as charged in the indictment and that it was a question for the jury with proper instruction, his contention in this regard being that the verdict against him was a general one and it follows that instead of it being permissible to hold as did the Circuit Court of Appeals, as shown by the majority opinion, that the verdict could be sustained if any one of the clauses of the statute were found not to require felonious intent as an element of the crime charged and he contends that the necessary conclusion from the manner in which the case was sent to the jury and the verdict received is that if any of the clauses of the statute and indictment require a felonious intent the conviction can not be upheld under the federal constitution. He further contends that the Circuit Court of Appeals is in error, as shown by the majority opinion in the holding of that Court, that felonious intent is not an ingredient of the crime charged (R. 64). And that the Circuit Court of

Appeals is further in error in holding that "the conversion to his use and selling of the bomb casings without authority were, as appears from the record, knowingly done by the appellant" (R. 66). And that the Circuit Court of Appeals is in error in holding that the indictment and statute do not require proof of a felonious intent (R. 66). And that the Circuit Court of Appeals is in error in holding that "the purpose of Congress in enacting Section 641 was to afford added protection against the taking of government property" (R. 67). And that the Circuit Court of Appeals is further in error in holding that "the word or as used in the statute evinces that purpose" (R. 67). And that the Circuit Court of Appeals is in error in holding that "if it had been intended to require knowing conversion to fall within the same category with embezzling, stealing or purloining the word and would have been used in the statute" (R. 67). And that the Circuit Court of Appeals is further in error in holding that "the phrase knowingly converts to his own use or the use of another would be surplusage if placed in the same category with embezzlement, stealing and purloining" (R. 67). And that the Circuit Court of Appeals in error in holding that scienter is not an essential ingredient of the crime charged in the indictment" (R. 68). And that the said Circuit Court of Appeals is further in error in holding that there was no evidence of abandonment and belief of abandonment to make a jury question of this issue (R. 69). And that the Circuit Court of Appeals is further in error in holding with the trial court that the defendant could be convicted without submitting to the jury the question of whether there was a criminal intent in the defendant's mind (R. 70). And that the Circuit Court of Appeals was further in error in sustaining the conviction pursuant to rule 52A of the Federal Rules of Criminal Procedure (R. 70).

1. A felonious intent is a necessary ingredient of the crime charged.

The crime charged is founded under Section 641 of Title 18, United States Code. It provides:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

This statute is a consolidation of Sections 82, 87, 100 and 101 of Title 18, United States Code, 1940 edition. These Sections provide:

Section 82 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 87 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in sections 80 and 82 to 86 of this title."

Section 100 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 101 of United States Code Annotated, 1940 Edition, is as follows:

> "Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender."

Section 87 provides, "whoever shall steal, embezzle or knowingly apply to his own use." This is the same thing

as is meant by the words in Section 641 which state, "whoever embezzles, steals, or knowingly converts to his own use."

The case of *Adolfson* v. *United States,* 159 Federal 2nd, 883, (C.A. 9) is cited in the majority opinion in support of the proposition that scienter, felonious intent are not an element of the crime "knowingly converts to his use." The *Adolfson* case holds just the opposite and I quote Honorable Homer T. Bone, who wrote the opinion in that case and said on page 888:

> "These conversations, admitted in evidence, together with the written confession of appellant, when considered in connection with the rest of the evidence and testimony in the case, clearly support an inference of 'guilty knowledge' on the part of appellant, i.e., that he did 'knowingly apply to his own use' property of the United States; that while so doing he knew the property was stolen."

And the Court further said:

> "The 'guilty knowledge,' if it existed, necessarily had to be and could be shown by all the surrounding facts and circumstances. To establish this claimed guilty knowledge as a relevant and material fact, the prosecution introduced evidence showing appellant's acts and statements at the time of the purchase, which it claimed revealed a clear intention and purpose to accomplish the unlawful acts charged in the indictment. We regard this evidence as relevant and competent for the purpose of showing the charged 'guilty knowledge' as a fact. This because the existence of this 'knowledge' of the character and value of the property was a material and necessary element in the prosecution's chain of evidence, and it was therefore proper to submit it to the jury on the question of whether or not this guilty knowledge existed and was proved beyond a reasonable doubt."

From the foregoing by the case cited by the Circuit Court of Appeals in this case in support of its opinion it appears that guilty knowledge was an element of the crime there charged. To "knowingly apply to his own use" and it would appear that this case is clear authority that guilty knowledge is required and is a jury question in the case at bar, as the section 641 uses the words "or knowingly converts" and the indictment charges "did unlawfully, wilfully and knowingly convert" and it appears clear that to knowingly convert and knowingly apply are the same thing. The dissenting opinion of the Honorable Thomas McAllister, Circuit Judge, in this case holds that felonious intent is an ingredient of the crime charged and a jury question with proper instruction, that scienter is an element of the statutory crime charged in the indictment.

The majority opinion of the Circuit Court of Appeals refers to the case of *United States* v. *Balint*, 258 U. S. 250, 66 Law Edition, 604 in support of the holding of the Circuit Court of Appeals that scienter, guilty knowledge, felonious intent is not an element of the crime charged in this case and that Congress, by an act to revise, codify, and enact into positive law, Title 18 of the United States Code and by Section 641, created a new crime which did not require scienter or felonious intent as an element. Chief Justice Taft, speaking for the court in the opinion in the *Balint* case said:

> "It is a question of legislative intent, to be construed by the Court."

The court went on to say:

> "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement some social betterment rather than the punishment of the crimes, as in cases of mala in se."

The court further said:

> "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact, and the difficulty of proof of knowledge, contributed to this conclusion."

The work on revision of Title 18, United States Code, entitled Crimes and Criminal Procedure commenced in 1943. (See statement of Honorable Eugene J. Keogh, member of Congress, made December 6, 1944, at a hearing before the house committee on revision of laws on H. R. 5450.) Mr. William W. Barron, chief revisor, said at the same hearing in answer to the following question found on page 2672 of Title 18, United States Code, Congressional Service:

The Chairman. Just to get back briefly to the question of substantial changes in existing law contained in this bill: Am I correct in my understanding that the reviser's notes will set forth clearly what the substantive changes are?

Mr. Barron. Yes.

The Chairman. So that any member of the House or any other interested person, looking at that, can take these notes and determine quickly what the changes have been?

Mr. Barron. In the great majority of cases you will find that only minor changes of phraseology were made. Every substantive change, no matter how minor, is fully explained so that if you in your discretion see fit to make these notes part of your report, they will adequately serve to interpret every proposed change.

At the hearing before the Subcommittee No. 1 of the House Judiciary Committee on H. R. 1600, March 7, 1947.

(H. R. 3190 was substituted for H. R. 1600 on which hearings were held.) See report to accompany H. R. 3190, page 1, Chairman Robsion stated that the bill did not change the law or the meaning of the law, page 2689, Title 18, United States Code, Congressional Service. At the same hearing and on page 2696 of the United States Code, Congressional Service, the following is found:

Mr. Chadwick. Mr. Keogh, I gathered from the very able presentation of the background of your approach that it is probably undesirable at this time for us to consider changes of the substantive laws that either are or might become controversial. This is not the time for that particular type of contribution. Am I correct?

Mr. Keogh. You are correct. But may I take an opportunity to explain my answer a little bit?

The motivation for our seeking to avoid as far as possible controversial substantive changes was due to the basic potential conflict of the jurisdiction of the Committee on Revision of the Laws and the House Judiciary Committee. I think to a large extent, by the merger of our functions into you, that that conflict is somewhat removed.

But, further, we proceeded upon the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law.

Mr. Robsion. And this bill does not include controversial matters?

Mr. Keogh. We have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion.

In the statement of William W. Barron, Chief Revisor for the West Publishing Company, on page 2709 stated:

"These bills simplify and clarify existing laws."

and on page 2710:

> "The Advisory Committee, the Committee of the Judicial Conference on the Revision of the United States Code, the revision staff and all persons concerned in this work, have exercised extreme care to avoid any changes of substantive law, concerning which there might be any controversy."
>
> "All of the judges and lawyers who worked on this revision had but the one idea in mind, to present to your body the best possible restatement of the statutory law."

And in the statement of Robert F. Klepinger, Attorney, Washington, D. C., who worked with the staff to assist in the revision, stated under reasons for enactment:

> "5. The original intent of Congress is preserved. This is because Federal decisions were followed which settled any doubt and, in addition, a uniform style of statutory expression was adopted.
>
> "6. All offenses are defined simply, thus avoiding repetitions. The only changes of any substance in the criminal statutes are those which harmonize and make uniform the punishments for felonies and misdemeanors in the interest of justice."

This is found on page 2725 of the same document.

And in a statement by Charles J. Zinn, Law Revision Counsel, Committee on the Judiciary at pages 2726 and 2727 he said:

> "In the work of revision, principally codification, as we have done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced.
>
> "To find out the intent, I think the courts would go to the report of the committee on the bills and these

reports are most comprehensive. We have incorporated in them Mr. Barron's notes to each section of the bills, both the criminal code and the judicial code.

"It is clearly indicated in each of those revisers' notes whether any change was intended so that merely because we have changed the language—we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly—but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law. So on that basis, I believe many fears may be allayed. People who are afraid that we are changing the law to a great extent need not worry particularly about it."

The Honorable John M. Robsion introduced H. R. 3190 in the House of Representatives on April 2, 1947. It was considered on May 12, 1947, and Congressman Robsion said in his statement on page 5181 of the Congressional Record:

"This bill is a restatement of the Federal laws relating to crimes and criminal procedure in effect on April 15, 1947."

He further said:

"The law is restated in simple, clear, and concise language."

Mr. Robsion indicated the only changes were because the Philippine Islands was no longer a part of the United States and in regard to the penalties and to consolidate similar statutes.

The Honorable Earl C. Michener, Chairman of the Committee on Judiciary, said at page 5182 of the Congressional Record:

"Where there is any indication of change every one of these questions is fully explained in the report."

On June 18, 1948, the United States Senate proceeded to consider H. R. 3190. The proceedings are shown at page 8906 of the Congressional Record for June 18, 1948. Senator Wiley stated:

"The original intent of Congress is preserved."

The report from the Committee on Judiciary, House of Representatives, to accompany H. R. 3190, sets forth at page 8:

"In many instances similar sections were consolidated without making fundamental changes in the offenses involved. This was true especially in the case of sections brought into the revision from titles 7, Agriculture; 12, Banks and Banking; and 15, Commerce and Trade.

"Good examples of such consolidations will be found in the chapter Embezzlement and Theft. There, in one instance, 11 sections were consolidated into 1, resulting in a tremendous saving of space and notable improvement in style and substance."

On page 9 the following is found:

"The reviser's notes are keyed to sections of this bill and explain in detail every change made in text."

The reviser's notes in regard to Section 641, found at page A54, are as follows:

"Based on title 18 U.S.C., 1940 ed., §§ 82, 87, 100, 101 (Mar. 4, 1909, ch. 321, §§ 35, 36, 47, 48, 35 Stat. 1095, 1096-1098; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197; Nov. 22, 1943, ch. 302, 57 Stat. 591). Section consolidates sections 82, 87, 100, and 101 of Title 18 U.S.C., 1940 ed. Changes necessary to effect the consolidation were made. Words "or shall willfully injure or commit any depredation against" were

taken from said section 82 so as to confine it to embezzlement or theft.

The quoted language, rephrased in the present tense, appears in section 1361 of this title.

Words "in a jail" which followed "imprisonment" and preceded "for not more than one year" in said section 82, were omitted. (See reviser's note under section 1 of this title).

Language relating to receiving stolen property is from said section 101.

Words "or aid in concealing" were omitted as unnecessary in view of definitive section 2 of this title.

Procedural language at end of said section 101 "and such person may be tried either before or after the conviction of the principal offender" was transferred to and rephrased in section 3435 of this title.

Words "or any corporation in which the United States of America is a stockholder" in said section 82 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

The provisions for fine of not more than $1,000 or imprisonment of not more than 1 year for an offense involving $100 or less and for fine of not more than $10,000 or imprisonment of not more than 10 years, or both, for an offense involving a greater amount were written into this section as more in conformity with the later congressional policy expressed in sections 82 and 87 of title 18, U.S.C., 1940 ed., than the nongraduated penalties of sections 100 and 101 of said title 18.

Since the purchasing power of the dollar is less than it was when $50 was the figure which determined whether larceny was petit larceny or grand larceny, the sum $100 was substituted as more consistent with modern values.

The meaning of "value" in the last paragraph of the revised section is written to conform with that provided in section 2314 of this title by inserting the words "face, par, or."

This section incorporates the recommendation of Paul W. Hyatt, president, board of commissioners of

the Idaho State Bar Association, that sections 82 and 100 of Title 18, U.S.C., 1940 ed., be combined and simplified.

Also, with respect to section 101 of title 18, U.S.C., 1940 ed., this section meets the suggestion of P. F. Herrick, United States Attorney for Puerto Rico, that the punishment provision of said section be amended to make the offense a misdemeanor where the amount involved is $50 or less.

Changes were made in phraseology."

It would appear from the statements made by everyone who worked on the codification and revision from 1943 on and from the committee report and from the presentation of the bill to the House and Senate that no drastic change of substantive law was made and certainly none such as claimed by the Circuit Court of Appeals in the decision of this case. The following authority is cited to show that no such change was made.

"It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." United States v. Ryder, 4 S. Ct. 196, 201, 110 U.S. 729, 740, 28 L. Ed. 308, 312, citing McDonald v. Hovey, 110 U.S. 619, 4 S. Ct. 142, 146, 28 L. Ed. 269 which sums up the rules for the construction of a revision as follows:

So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365. As said by the New York Court for the Correction of Errors, in Taylor v. Delancy, 2 Cai. Cas., 150: "Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the

Legislature to work a change." And see, Yates' Case, 4 Johns., 359; Theriat v. Hart, 2 Hill, 380; Parmelee v. Thompson, 7 Hill, 77; Goodell v. Jackson, 20 Johns., 722; Croswell v. Crane, 7 Barb., 191. "The construction will not be changed by such alterations as are merely designed to render the provisions more precise." Moores v. Bunker, 29 N.H., 420. So the Supreme Court of Alabama has held that the Legislature of that State in adopting the Code, must be presumed to have known the judicial construction which had been placed on the former statutes; and therefore the re-enactment in the Code of provisions substantially the same as those contained in a former statute is a legislative adoption of their known judicial construction. Duramus v. Harrison, 26 Ala., 326. "A change of phraseology in a revision will not be regarded as altering the law where it had been well settled by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent." Sedg. Const., 2d ed., 229,. Of course, a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law. Young v. Dake, 5 N.Y., 463."

This rule has been reaffirmed by the Supreme Court of the United States in numerous cases. See *Anderson* v. *Pacific Coast S. S. Co.*, 32 S. Ct. 626, 630, 225 U.S. 187, 56 L. Ed. 1047, in which the Court said:

"For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed. United States v. Ryder, 110 U. S. 729, 740, 28 L. Ed. 308, 312, 4 Sup. Ct. Rep. 196; United States v. LeBris, 121 U. S. 278, 280, 30 L. Ed. 946, 7 Sup. Ct. Rep. 849; Logan v. United States, 144 U. S. v. Mason, 218 U. S. 518, 525, 54 L. Ed. 1133, 1136, 31 Sup. Ct. Rep. 28."

In *Hale* v. *Iowa State Board of Assessment and Review*, 58 S. C. 102, 104, 302 U. S. 95, 102, 82 L. Ed. 72, Cardozo, J., writing for the court and construing the Iowa Code said:

"There can be little doubt that the meaning remains what it was before. United States v. Ryder, 110 U. S. 729, 740, 4 S. Ct. 196, 28 L. Ed. 308; United States v. Sischo, 262 U. S. 165, 168, 169, 43 S. Ct. 511, 512, 67 L. Ed. 925; Warner v. Goltra, 293 U. S. 155, 161, 55 S. Ct. 46, 49, 79 L. Ed. 254; Davis v. Davis, 75 N. Y. 221, 225, 226; Fifth Avenue Bldg. Co. v. Kernochan, 221 N. Y. 370, 375, 117 N. E. 579; Mitchell v. Simpson, L. R. 25 Q. D. 183, 189."

In *United States* v. *Sischo*, 43 S. Ct. 511, 512, 26 U. S. 167, 169, 67 L. Ed. 925, reversing 270 Fed. 958 which affirmed 262 Fed. 1001, Holmes J. writing for the court noted that the Revised Statutes of 1878 was primarily a codification of general statutes not lightly to be read as making a change, although of course it may do so.

The verdict in this case was a general verdict and convicted the defendant of everything that is well charged in the indictment. The indictment charged that the defendant did "unlawfully, willfully and knowingly steal" (R. 3). The verdict found him "guilty of the crime in said indictment contained" (R. 51). The judgment and commitment show that the defendant was "convicted on verdict of guilty of the offense charged in the indictment in the above entitled cause, to-wit, Theft of Government property" (R. 52). It is conceded by the Circuit Court of Appeals as shown by the majority opinion, that the word stealing as denounced in the statute requires proof of felonious intent to sustain conviction (R. 67). The case of *Crabb* v. *Zerbst*, 99 F. 2d 562, 565 (C. A. 5) is authority that the word steal as used in this statute is used to denote a dishonest transaction and requires proof of felonious intent as an element of the crime denounced.

In the case of *Statler* v. *United States*, 157 U. S. page 277, Mr. Justice White, speaking for the court, said:

"Indeed, it is settled beyond question that a verdict of guilty, without specifying any offense, is general,

and is sufficient, and is to be understood as referring to the offense charged in the indictment. St. Clair v. United States, 154 U. S. 154 (38:934); Bond v. People, 39 Ill. 26; State v. Jurche, 17 La. Ann. 71; State v. Curtis, 28 N. C. 247; State v. Tuller, 34 Conn. 280; State v. Morris, 104 N. C. 837."

And the court quoted from Bishop on Criminal Procedure, page 623, Section 1005a, as follows:

"So, likewise, a general finding of 'guilty' will be interpreted as guilty of all that the indictment well alleges."

In the case of *Stromberg* v. *California*, 283 U.S. 359, 75 L. Ed., 1117, Mr. Chief Justice Hughes delivered the opinion of the Court. He said:

"The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this court, that the state's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the

clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

2. The Instructions on Abandonment Should Have Been Given to the Jury by the Trial Court.

Brown On Personal Property, page 9, states:

> "The question whether there is an abandonment or not, thus turns on the fact of intent to be determined by the jury in the light of all the circumstances."

Log-Owners' Booming Co. v. *Hubbell*, 135 Michigan. Page 69, states in regard to abandonment.

> "This may be inferred from the conduct of the owners and the situation of the property. If these logs were so situated that there was no danger of injury by decay or otherwise, and the owners had from time to time taken logs therefrom, as they annually drove the river, the intent to abandon could hardly be presumed from lapse of time."

In the case of *Jordan* v. *State*, 107 Tex. C. R. 414, 296 S. W. 585 is one in which the facts are very similar to the case at bar. The respondent in that case was charged with larceny of parts from an automobile that had remained on the side of the road for about a month and had been previously stripped of casings and other parts, including the cylinder head and thinking that the car was junk the respondent removed the radiator, generator and self starter and took them home in the daytime. He said he had no intention of stealing them and believed that the car had been thrown away. He later tried to sell the parts. Defendant's conviction was first affirmed by the Supreme Court of Texas and on a motion for rehearing the court said:

> "We have reached the conclusion that we were in error in holding that the facts do not raise the issue requiring the submission of the requested charge."

The dissenting opinion in this case on the part of the Honorable Thomas M. McAllister, Circuit Judge, and the cases therein cited in support of it are 90, 91 and 92, show that the issue of abandonment should have been submitted to the jury. The Trial Judge and the majority opinion in this case state that there is no evidence of abandonment, that the old bomb casings taken by the defendant, the location of the old bomb casings twenty-four miles away from the headquarters of the bomb base (R. 6) in the deep woods, just general deer country (R. 13) the fact that the old bomb casings had been lying out there for perhaps fifteen years and at least four or five years (R. 7) (R. 13) that they were all rusted out and in the process of decomposition (R. 14) together with the fact that the defendant did not know that the old bomb casings were not to be removed from where they were (R. 23) and the fact that this junk was rotting and rusted right out so the Defendant thought it had been abandoned (R. 35), is evidence for the jury as to whether or not the old bomb casings taken by the defendant were, in fact, abandoned and to his belief that they had been abandoned.

3. The instruction to the effect that the taking was open and notorious, showing an absence of felonious intent should have been given.

This instruction was taken from 5 Reid's Branson Instructions to juries p. 133, Sec. 3365 (2).

32 American Jurisdprudence, at page 1049, states:

> "As a general rule, however, where there is some evidence that the taking was under claim of right on the part of the accused, evidence that the property was taken openly, without any concealment or subsequent effort to conceal the taking, is evidence of good faith in the claim of right thereto and is frequently stated by the courts to be strong evidence or very powerful evi-

dence thereof. Some courts declare that where property is taken openly, and there is no subsequent attempt to conceal it, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, and this presumption must be repelled by clear and convincing evidence before a conviction for larceny is authorized."

4. The trial court committed error by directing a verdict of guilty and if his charge is not a directed verdict of guilty, it is so argumentative and biased as to constitute reversible error and the proceedings in the trial of this case so far departs from the accepted and usual course of judicial proceedings as to deny the defendant a trial by jury and due process of law as guaranteed to him under the United States Constitution.

The trial judge directed a verdict of guilty in this case (R. 47) (R. 48) and (R. 49). In the case of *United States* v. *Murdock*, 290 U. S. 389-398, 78 L. Ed. 381, Mr. Justice Roberts speaking for the court said:

"In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury, Patton v. United States, 281 U. S. 276, 288, 74 L. Ed. 854, 858, 50 S. Ct. 253; 70 A.L.R. 263; Quercia v. United States, 289 U. S. 466, 77 L. Ed. 1321, 53 S. Ct. 698. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. Horning v. District of Columbia, 254 U. S. 135, 65 L.

> Ed. 185, 41 S. Ct. 53. The present, however, is not such a case, unless the word 'willfully,' used in the sections upon which the indictment was founded, means no more than voluntarily."

From the beginning of the trial before the District Judge the theory of the defendant was put forth. This continued all through the trial. On many occasions authorities were shown the court in support of defendant's theory. The record shows that trial began on June 13, 1949, (R. 4) and that the jury retired at 1:46 p.m. on June 14, 1949, that defendant's attorney was given fifteen minutes to argue the case to the jury (R. 41) and was not permitted to argue their defense to the jury (R. 42) where the trial court said:

> "I am not going to permit you to argue to this jury that this man can go on somebody else's property, take property, and then go away and say, 'I thought they abandoned it.'"

The court would not permit argument on the point at the end of the case and before it was submitted to the jury (R. 45).

In the case of *People* v. *Lee*, 258 Michigan Reports, page 621, the following language is found:

> "While this court has always conceded to a trial court a liberal discretion in the control and direction of statements and arguments of counsel to the jury, it has as strongly upheld the right of counsel to state their theory of the law as applicable to the facts which they expect to prove."

The denial by the trial court of the right to argue to the jury defendant's theory and only defense, that he thought the property was abandoned and that he had no intention to steal was in effect denial to the defendant of a trial by jury and was, when taken together with the Court's charge

directing the verdict of guilty, a denial of a trial by jury and due process of law guaranteed by the United States Constitution.

Conclusion

The following from St. Matthew, 15: 19, 20 is in point:

> "For out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, blasphemies:
> These are the things which defile a man: but to eat with unwashen hands defileth not a man."

Respectfully submitted,

ANDREW J. TRANSUE,
Attorney for Defendant,
303 Dryden Building,
Flint, Genesee County, Michigan.

Dated: September 20, 1951.

No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1950

JOSEPH EDWARD MORISSETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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JOSEPH EDWARD MORISSETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court overruling petitioner's motion for a new trial (Pet. 21-23) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 64-93) are reported at 182 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1951 (R. 63). The petition for a writ of certiorari was filed on March 6, 1951. The jurisdiction of this Court is invoked under

28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether a felonious intent is an element of the offense of knowingly converting government property.

2. Whether there was evidence that the government property in question had been abandoned so as to require the submission of that question to the jury.

3. Whether the jury should have been instructed to acquit petitioner if they accepted his contention that he believed the property had been abandoned.

STATUTE INVOLVED

18 U.S.C. (1948) 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not ex-

ceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT

The indictment under which petitioner was convicted charged that on or about December 2, 1948, he "did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18" (R. 3-4). The evidence adduced at the trial may be summarized as follows:

The United States had leased from the Conservation Department and Department of Agriculture of the State of Michigan for use as a practice bombing range on the Oscoda Air Base (R. 10, 13-14), land on which there were a number of "danger" signs (R. 9, 13, 16, 17, 19, 21, 22, 23). The sign at the entrance to the bombing area read, "Danger, Keep Out, Bomber Range" (R. 9), and other signs warned, "United States Government Property—Stay Off" (R. 19). The practice bomb used consisted of a bomb casing about 3½ feet long, 8 inches in diameter, and 16 pounds in weight,

which was filled with 100 pounds of sand and a three-pound charge of black powder (R. 9). After practice bombing, the old casings, some of which would be dangerous if the black powder had not exploded, were cleared from the area and stacked in piles at the edge of the range (R. 9, 10). This particular type of casing had been used at least as far back as 1944. Many of the stacked casings were rusted and decomposed from exposure to the weather, and had holes in them from explosions. (R. 15, 16, 38.)

Petitioner operated a fruit business during the summer and worked as a junk dealer during the winter (R. 30, 34). On November 22 or 23, 1948, he and his brother-in-law, one Atchison, were hunting deer without success on the Oscoda Army Air Base. During daylight hours, they piled about three tons of used bomb casings on petitioner's truck and took them in two trips to the farm of Atchison's uncle about 20 miles away. During the loading, they talked to some other hunters who came by. (R. 20, 24-25, 31-32.) At the farm, a tractor was used to flatten the casings so that petitioner could carry more of them on his truck (R. 21, 25, 32).

Petitioner admitted that by reason of his deer hunting on the air base for about the preceding three years he was familiar with the signs around the bombing range and knew that it belonged to the United States Government (R. 34). He also

admitted that he did not have permission to take the casings (R. 35). The commanding officer of the air base testified that on and before December 1, 1948, he did not have authority to dispose of the used casings (R. 9), and that petitioner did not at any time ask his permission to take them (R. 16).

On or about December 2, 1948, at about 1:30 or 2:00 p.m. petitioner loaded the bomb casings on his truck and started from the farm toward Flint, Michigan, for the purpose of selling them (R. 20, 25, 37). John Wagner, upon seeing the bomb casings on the truck, stopped petitioner at a road junction and, according to his testimony, he "told [petitioner] he was taking a chance, advised him to take [the bomb casings] back where he got them" (R. 19). Petitioner denied that he had such a conversation with Wagner, and asserted that the latter merely stated "he had some scrap over to his place he wanted to sell" (R. 32-33). Leo May, a worker in a scrap drive for the Chamber of Commerce and Agriculture of Oscoda, also saw petitioner at the road junction and "wondered why anybody else could get [bomb casings] when we couldn't get them for our scrap drive" (R. 7). Arriving at Flint with his load, petitioner sold the three tons of casings at $28.00 per ton, or a total of $84.00, to the Laro Coal and Iron Company (R. 22, 25, 28, 33).

The day after Leo May told his father about seeing petitioner's truck with the bomb casings on

the highway, the elder May, an employee at the Oscoda Air Base, related this incident to the commanding officer of the base, who in turn notified the State Police and the C.I.D. Section at Selfridge Field, of which Oscoda was a sub-base (R. 7, 9, 16). On December 10, 1948, when a State policeman stopped petitioner on the highway and inquired if he had taken some bomb casings from the air base, petitioner admitted that he had done so without permission and had sold three tons of the casings at $28.00 per ton (R. 22). On January 20, 1949, after learning that a Federal Bureau of Investigation agent desired to talk to him, petitioner went to the F.B.I. office in Flint and made and signed a statement, which was introduced in evidence without objection. In this statement, petitioner admitted the sale of three tons of bomb casings for a total of about $85.00, and said: "* * * We did not get any deer so we decided to make our hunting trip pay by loading up my 2 ton, 1948 red Studebaker with the bomb casings. * * * I knew the bomb casings were at one time U.S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were." (R. 23-25.)

The following requested instruction, which the trial court refused to give, shows the theory of petitioner's defense (R. 54):

> 1. The defendant took the property and sold it. There is no question about that.

> The question is: What was in Mr. Morissette's mind at the time he took it? Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.
>
> Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

Before the court gave its charge, this colloquy occurred (R. 48):

> Mr. TRANSUE [petitioner's counsel]: Our theory of this is that if [petitioner], when he picked these things up, thought nobody wanted them, it would be like junk that would be alongside the road. It is the state of his mind at the time. You have to have a state of mind to be a thief.
>
> The COURT: The state of his mind was to take something that didn't belong to him, and there is the intent. If I am wrong, I am wrong. Bring in the jury.
>
> I will not permit you to show this man thought it was abandoned. If that is the law I want a higher court than I am to say so.
>
> * * * * *
>
> I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property.

In its charge, the court, after reciting the facts that petitioner said he thought the casings were

abandoned, that he knew they did not belong to him, and that he sold three tons of them, continued:

> Now, [petitioner] admits that. The defense that they sought to introduce here was that he thought it was abandoned property. And I instruct you that there are some instances where a person can take property that appears to be abandoned, and take it and really be guilty of no criminal offense. And this court permitted all the testimony to go in. But when it comes to the time of instructing the jury, I must instruct you that in this case there is no evidence of abandoned property. Abandoned means absolute relinquishment, including both the intent to abandon, and the external act by which intention is carried into effect.
>
> And when the evidence is such as to raise the issue, abandonment is a question for the jury. But ladies and gentlemen, I hold in this case that there is no question of abandoned property. * * *
>
> In every crime there must be an intent to do the thing that the person does. * * * the question is here, Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it. [R. 51.].

* * * * *

I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this

court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. [R. 52-53.]

Petitioner's counsel excepted to the charge and the following colloquy ensued (R. 53-54):

The COURT: Your exception is I should submit to the jury the question of abandonment?

Mr. TRANSUE: Not only the question of abandonment, but also the condition of his mind and the intent that he had at the time that this was removed; that there must have been a felonious intent in his mind to take it away and not be just a trespass.

The COURT: Well, all right. The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.

You may make any other objection on the record.

* * * * * *

Mr. TRANSUE: The objection is this, as I understand the court's charge, that the taking is the intent.

The COURT: No. I leave the question to them whether he intended to take it. He says he did.

Mr. TRANSUE: But the taking must have been with a felonious intent.

The COURT: That is presumed by his own act.

Mr. TRANSUE: That is my exception.

The COURT: All right.

Mr. TRANSUE: That the felonious taking cannot be derived just from the taking.

The COURT: All right, overruled.

The jury having found petitioner guilty, the court sentenced him to two months' imprisonment, or to pay a fine of $200.00, together with costs (R. 55-57). The court denied petitioner's motion for a new trial (R. 59), and on appeal, the Court of Appeals affirmed, one judge dissenting (R. 63).

ARGUMENT

1. Petitioner contends, relying upon the dissenting opinion below, that as a prerequisite for conviction under 18 U.S.C. 641 (*supra*, pp. 2-3) there must have been "a felonious intent in his mind at the time he took the bomb cases and converted them

to his own use" (Pet. 10-18). To the contrary, we believe that the words "knowingly converts" in the statute clearly require only a deliberate conversion of government property to the taker's own use, and that no further element of intent is necessary to complete the offense. In advancing this argument, petitioner attempts to show that under Sections 82, 87, 100, and 101 of 18 U.S.C., 1940 ed., which were consolidated, according to the reviser's notes,[1] into the present 18 U.S.C. 641, felonious intent was an ingredient of each of the crimes proscribed. But 18 U.S.C. 641 is different from the former Sections 82, 87, 100 and 101[2]; whereas Sections 82 and 101 each mentioned a specific intent, 18 U.S.C. 641 does not expressly prescribe any intent as an element of the crimes defined in the first paragraph (the only part pertinent here), although it does require an "intent to convert" as an element of the crimes of receiving and concealment defined in the second paragraph. It would seem that Congress would have written into the new Section 641 an unequivocal requirement of felonious intent if it had thought this should be required as a condition for a conviction under the

[1] Title 18, United States Code, Congressional Service (1948), pp. 2505-2506.

[2] In 18 U.S.C., 1940 ed., Section 82 read: "* * * take and carry away or take for his use, or for the use of another, with intent to steal or purloin * * *"; Section 87: "* * * steal, embezzle, or knowingly apply to his own use * * *"; Section 100: "* * * embezzle, steal, or purloin * * *"; Section 101: "* * * receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain * * *."

first paragraph, especially in view of the fact that it had prescribed a specific intent in two of the old sections and also in the second paragraph of the new Section 641. Petitioner sought to have the courts below read into the first paragraph of 18 U.S.C. 641 a provision which is not there, i.e., one requiring felonious intent. But the wording of the statute being plain, the courts had "no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision" (*United States* v. *Temple,* 105 U.S. 97, 99); they could not "interpolate a qualification which the statute does not contain" (*Ransom* v. *Williams,* 2 Wall. 313, 318).

As the majority below properly held, citing *Adolfson* v. *United States,* 159 F. 2d 883 (C.A. 9), certiorari denied, 331 U.S. 818, by reason of the disjunctive "or" before the clause "knowingly converts to his own use or the use of another" in section 641, the statute "is not limited in coverage to embezzling, stealing and purloining government property, but also includes the knowing conversion of such property by anyone to his own use" (R. 67). Even the word "steal" has "no common law definition to restrict its meaning as an offense, [and] is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership * * *." *Crabb* v. *Zerbst,* 99 F. 2d 562, 565 (C.A.

5); see also *United States* v. *Handler*, 142 F. 2d 351, 353 (C.A. 2), certiorari denied, 323 U.S. 741. But if the offenses of stealing and embezzling implicitly require a felonious intent as an ingredient, the statute is clear in requiring only that a conversion of government property be committed "knowingly"; and "knowingly" does not necessarily mean absolute knowledge or a specific intent. *United States* v. *Weisman*, 83 F. 2d 470, 474 (C.A. 2), certiorari denied, 299 U.S. 560. It is highly significant that the immediately following words in the same statute make it a crime, without regard to intent, to sell, convey or dispose of government property "without authority". The clear purpose of these provisions, like the provision here involved, is to penalize all deliberate interference with government property, without regard to the existence of any particular criminal intent.

As used in federal criminal statutes even the word "wilfully," a more restrictive term than "knowingly," has been held in some contexts to mean no more than that a person charged with a duty knows what he is doing, and not that he must suppose that he is breaking the law. *Fields* v. *United States*, 164 F. 2d 97, 100 (C.A. D.C.), certiorari denied, 332 U.S. 851; *Dennis* v. *United States*, 171 F. 2d 986, 990 (C.A. D.C.), affirmed 339 U.S. 162.

A person "is presumed to intend the necessary and legitimate consequences of what he knowingly

does." *Reynolds* v. *United States*, 98 U.S. 145, 167; *Dunlap* v. *United States*, 70 F. 2d 35, 37 (C.A. 7), certiorari denied, 292 U.S. 653. And it is no defense to a wrongful act knowingly and intentionally committed that it was done without a criminal intent. *Gates* v. *United States*, 122 F. 2d 571, 575 (C.A. 10), certiorari denied, 314 U.S. 698; see also *Waller* v. *United States*, 177 F. 2d 171, 175 (C.A. 9).

Petitioner admitted that he knew the bombing range from which he took the bomb casings belonged to the United States Government and that he did not have permission to take them. The fact that his actions occurred during daylight without attempt at concealment did not exculpate him. It is clear that he intended to take property which was not his and he knowingly converted it by sale for his own profit. His admitted acts knowingly performed compelled his conviction under 18 U.S.C. 641, regardless of his subjective intent as to whether he was committing a criminal offense. As the majority below held, "The conversion to his use and the selling of the bomb casings without authority were, as appears from the record, knowingly done by the [petitioner]." (R. 66.)[3]

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[3] Petitioner asserts a conflict (Pet. 11-12, 16) between the decision below and *Adolfson* v. *United States*, 159 F. 2d 883 (C.A. 9), certiorari denied, 331 U.S. 818. *Adolfson* did not involve an interpretation of 18 U.S.C. 641, which had not yet been enacted, and, furthermore, the prosecution there, under 18 U.S.C. (1940 ed.) 87, was against a person who bought property from another who had stolen it from the

2. Petitioner apparently contends, again in reliance upon the dissenting opinion below, that the issue as to whether the property had been abandoned by the Government should have been submitted to the jury (Pet. 10, 18).

As the trial court correctly stated the law in its charge, abandonment includes "both the intent to abandon,[4] and the external act by which the intention is carried into effect" (R. 51).[5] And while "abandonment is ordinarily a question of fact, to be determined by the circumstances and the intention of the party against whom the plea is asserted, * * * where there is and can be no dispute about the facts, it then becomes a question of law." *Kister Oil Development Corp.* v. *Young*, 27 F. 2d 433, 437 (W.D. Ky.).

There was no dispute here about the facts as to the alleged abandonment. True, some of the bomb casings were rusted and decomposed, and petitioner made the self-serving statement that he "thought

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Government, and the issue was as to his guilty knowledge of the theft. Neither is there conflict (see Pet. 16) with *Crabb* v. *Zerbst*, 99 F. 2d 562 (C.A. 5), also decided before the enactment of 18 U.S.C. 641. That case involved a conviction under Section 46 of the Criminal Code (then 18 U.S.C. 99), which used the express language, "feloniously take and carry away," so that there was no question, as here, of reading such a requirement into the statute.

[4] *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 597-598; *Carter Oil Company* v. *Mitchell*, 100 F. 2d 945, 951-952 (C.A. 10); *International Finance Corp.* v. *Jawish*, 71 F. 2d 985, 986 (C.A.D.C.).

[5] *Helvering* v. *Jones*, 120 F. 2d 828, 831 (C.A. 8); certiorari denied, 314 U.S. 661; *Weakley* v. *Johnson*, 294 Fed. 258, 260 (C.A. 5); *Log-Owners' Booming Co.* v. *Hubbell*, 135 Mich. 65, 69; *Hediger* v. *Zastrow*, 174 Minn. 11, 12.

[they] had been abandoned" (R. 37-38). However, as the majority below pointed out, "No proof was adduced by the [petitioner] to the effect that the property had actually been abandoned" (R. 70). Such evidence as there was on this matter showed the contrary. The casings had been stacked in piles (R. 9, 10) and had not been scattered about haphazardly, which would seem to indicate that the Government would some day ship and sell them for salvage (cf. R. 52). If petitioner could find a buyer for them, as he did, it is a reasonable assumption that the Government also could do so. A further indication that the Government had no intention of abandoning the casings was the fact that they had been kept on its own property and had not been moved to other property or to a common junk pile. The commanding officer of the air base testified that he did not have authority to dispose of the bomb casings (R. 9), and that petitioner did not at any time ask his permission to take them (R. 16). Neither did petitioner claim that he had any permission to take the casings, which he knew did not belong to him (R. 30), or that he made any attempt to contact the Army authorities at the base to ascertain whether the property had actually been abandoned so that he could legally remove it. Nor did he claim that operations at the base had been discontinued; on the contrary, he was familiar with

the signs around the bombing range and knew that it belonged to the Government (R. 34). In these circumstances, we think the majority below correctly sustained (R. 69-70) the trial judge's action in refusing to allow the jury to speculate on this matter and in instructing them as a matter of law that "in this case these is no evidence of abandoned property" (R. 51). Cf. *Worsham* v. *State*, 56 Tex. Crim. 253, 260.

3. By the same token, the trial judge was justified in refusing petitioner's requested instruction that if he believed, even though mistakenly, that the casings had been abandoned, the jury should find him not guilty (see pp. 6-7, *supra*). The evidence as to the stacking of the casings on plainly marked government land and the warning given petitioner by the witness Wagner (*supra*, p. 5) plainly showed that petitioner could not possibly have entertained a *bona fide* belief that the casings had been abandoned, especially when it is considered that a simple inquiry of the proper authorities would have determined whether he had any right to take them. It is not error to refuse to submit a sham issue to a jury; there must be evidence which will rationally support a finding in favor of the party having the affirmative. *Battle* v. *United States*, 209 U.S. 36; *Passantino* v. *United States*, 32 F. 2d 116 (C.A. 8); *Shaw* v. *United States*, 151 F. 2d 967 (C.A. 6). In the face

of the evidence that the casings had not been abandoned and the lack of any evidence to the contrary, petitioner was not entitled to have the jury speculate that he may have thought he had a right to help himself to the property.[6]

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[6] Petitioner asserts, in the form of a "question presented," but without supporting argument, that the trial judge's charge amounted to a direction of a verdict of guilty or was at least "argumentative and biased" (Pet. 6). The issues at the trial conterned only the requisite intent under the statute and petitioner's assertion that he thought the casings had been abandoned. In view of the judge's correct resolution of these issues, he was quite right in his comments that there was no dispute that petitioner took the casings from government land without permission and that the question as to petitioner's state of mind was whether he intended to take the property. The judge did indicate that under his view as to the proper interpretation of the statute, the evidence on both sides pointed to guilt (*supra*, p. 9). He was unquestionably right in his summary of the evidence and it was not error for him to tell the jury that if they believed the testimony offered by the government petitioner was guilty as a matter of law. But the judge did not invade the jury's province, for, along with the standard instructions as to the presumption of innocence and the Government's burden of proof (R. 49-50), he made it clear to the jury that they were "the judges of the facts," that it was for them to say whether they believed "one story or the other," and that they were free to bring in a verdict of not guilty (R. 52). In any event, to borrow the language of the majority of the Court of Appeals, "As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions. To reverse and remand for a new trial because of the expressions of the district judge in his charge would be to ignore the spirit as well as the letter of Rule 52(a) of the Federal Rules of Criminal Procedure respecting harmless error. * * *" (R. 70.)

CONCLUSION

The case involves no conflict or question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1951

JOSEPH EDWARD MORISSETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court overruling petitioner's motion for a new trial (Pet. 21–23) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 56–85) are reported at 187 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1951 (R. 55). The petition for writ of certiorari was filed on March 6, 1951, and granted on May 7, 1951 (R. 87). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under 18 U. S. C. 641, one who "knowingly converts to his use" property of the United States, must have acted with the felonious intent required in common law larceny.

2. Whether the trial judge properly refused to submit to the jury the question of whether the United States had in fact abandoned the bomb casings taken by petitioner.

3. Whether the trial judge properly refused to submit to the jury the petitioner's defense that he believed the bomb casings had been abandoned.

4. Whether the trial judge correctly refused to instruct the jury that an open and notorious taking would create "a strong presumption" that the petitioner lacked a felonious intent.

5. Whether the trial judge invaded the province of the jury.

STATUTE INVOLVED

18 U. S. C. (1948) 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the

same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT

The petitioner was tried, convicted, and sentenced to two months imprisonment or to pay a fine of $200 and costs (R. 51–52), under an indictment charging that on or about December 2, 1948, he "did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18" (R. 3).

The evidence adduced at the trial may be summarized as follows: The United States had leased land from the Conservation Department and Department of Agriculture of the State of Michigan for use as a practice bombing range at the Oscoda Air Base (R. 9, 12). Signs had been

placed around the entire area warning persons that they were not permitted on the premises (R. 7, 11, 14–15, 17, 19, 20, 21, 36). The sign at the entrance to the bombing area read "Danger, Keep Out, Bomber Range" (R. 7), and other signs warned, "United States Government Property—Stay Off" (R. 17). The practice bomb used consisted of a steel bomb casing about 3½ feet long, 8 inches in diameter, and 16 pounds in weight, with "recognizable" tail fins (R. 8, 23). The bomb was filled with 100 pounds of sand and a three-pound charge of black powder (R. 8). This particular type of casing had been used at least as far back as 1944 (R. 13). After practice bombing, the spent casings were cleared from the target area and placed in piles at the edge of the range (R. 8). There was testimony and photographic evidence to the effect that the used bomb casings had rusted to a varying degree from exposure to the weather (R. 14, 28, 34–35).

Petitioner, aged 27, operated a fruit business during the summer and worked as a junk dealer during the winter. He testified that he had "been buying junk off and on" for three to four years "all over Michigan." (R. 27, 31.) One dealer saw him once or twice each week in the fall and winter for two years (R. 26–27). On November 22 or 23, 1948, petitioner and his brother-in-law, one Atchison, were hunting deer on the Oscoda Army Air Base. Such hunting was not permitted

(R. 7), but it was apparently done by others as well as by petitioner (R. 12, 18–19, 20–21, 23, 28, 36). Petitioner and Atchison, during daylight hours, piled about three tons of the bomb casings on petitioner's truck and took them, in two trips, to the farm of Atchison's uncle about 20 miles away. They testified that during the loading they talked to some other hunters who came by. (R. 18–19, 22, 28–29.) At the farm, the casings were placed in a field with six or seven tons of other junk, in "plain view" of the road, but about 165 feet way from it (R. 19, 29), and petitioner and Atchison crushed the casings with a tractor so that petitioner could carry more of them on his truck (R. 18, 19, 22, 29).

Petitioner admitted that he was familiar with the signs around the bombing range and knew, at the time of the taking, that the casings were on government property (R. 31, 35).[1] He also

[1] Thus, at R. 35:

"Q. It was still on property of the United States Government, wasn't it, when you picked it up?

"A. I guess it was.

"Q. You guess it was. Don't you know?

"A. I didn't know at the time, no.

"Q. Didn't you testify you hunted on the bombing range?

"A. I did.

"Q. Isn't the bombing range government property?

"A. It is if it is marked. There is some State land around there, too.

"The Court. You knew it wasn't your property, didn't you?

"A. Yes.

"The Court. Didn't you say on cross-examination you

admitted that he did not have permission to be on the bombing range or to take the casings but thought the casings had been "thrown away" or "abandoned" (R. 34–35). The commanding officer of the air base testified that on and before December 1, 1948, he did not have authority to dispose of the used casings (R. 8), and that petitioner did not at any time ask his permission to take them (R. 14).

On or about December 2, 1948, at about 1:30 or 2:00 p. m. petitioner loaded the bomb casings on his truck and started from the farm toward Flint, Michigan, for the purpose of selling them (R. 22, 33–34). John Wagner, upon seeing the bomb casings on the truck, stopped petitioner at a road junction and, according to his testimony, "told [petitioner] he was taking a chance, advised him to take [the bomb casings] back where he got them" (R. 16–17). Petitioner denied this portion of the conversation, and asserted that Wagner merely stated that "he had some scrap over to his place he wanted to sell"

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knew this was government property where you got the bomb casings, didn't you say that?

"A. Yes, sir.

"Q. In your statement, Mr. Morissette, didn't you say you were hunting deer on the United States Government Air Force bombing range at Oscoda, Michigan?

"A. Yes.

"Q. You knew that was government property then, didn't you?

"A. Yes."

and asked what petitioner had on the truck (R. 30). Leo May, who also saw petitioner at the road junction, testified that "in the scrap drive for the Chamber of Commerce and Agriculture we tried to get [the bomb casings] and couldn't get them. I wondered why anybody else could get them when we couldn't get them for our scrap drive." He reported the matter to his father, an employee at the air base. (R. 5.)

Arriving at Flint with his load, petitioner sold the three tons of casings at $28.00 per ton, or a total of $84.00, to the Laro Coal and Iron Company (R. 20, 22–23, 25–26, 30–31).

The day after Leo May told his father about seeing petitioner's truck with the bomb casings, the elder May informed the commanding officer of the base, who in turn notified the State Police and the Criminal Investigation Division at Selfridge Field, of which Oscoda was a sub-base (R. 6, 7, 14). On December 10, 1948, when a State policeman stopped petitioner on the highway and inquired if he had taken some bomb casings from the air base, petitioner admitted that he had done so without permission and sold three tons of the casings at $28.00 per ton (R. 20). On January 20, 1949, after learning that a Federal Bureau of Investigation agent desired to talk with him, petitioner went to the F. B. I. office in Flint and made and signed a statement, which was introduced in evidence without objection. In this

statement, petitioner admitted the sale of three tons of bomb casings for a total of about $85.00, and said: "* * * We did not get any deer so we decided to make our hunting trip pay by loading up my 2 ton, 1948 red Studebaker with the bomb casings. * * * I told [the owner of the farm to which the casings were taken] my load at the time consisted of bomb casings that I wanted to smash together so that I could carry more on my truck * * *. I knew the bomb casings were at one time U. S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were." (R. 21–23.)

The issues in this case arise out of the trial judge's charge to the jury and the petitioner's requested instructions which the trial judge refused to give. The petitioner requested an instruction (R. 50) that—

> Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.

The trial judge refused to give this instruction, but instead charged the jury (R. 47) that,

> In every crime there must be an intent to do the thing that the person does. For example, if you walk away with a thousand dollars in your pocket that you don't know

is there, you hadn't intended to steal that thousand dollars at all. There is no intent. But the question is here. Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it.

After the jury had retired, the petitioner excepted to the charge as follows (R. 49–50):

Mr. TRANSUE: The objection is this, as I understand the court's charge, that the taking is the intent.

The COURT: No. I leave the question to them whether he intended to take it. He says he did.

Mr. TRANSUE: But the taking must have been with a felonious intent.

The COURT: That is presumed by his own act.

Mr. TRANSUE: That is my exception.

The COURT: All right.

Mr. TRANSUE: That the felonious taking cannot be derived just from the taking.

The COURT: All right, overruled.

The petitioner requested an instruction (R. 50) that,

* * * if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

The trial judge refused to give this instruction (R. 42–44), refused to permit the petitioner's counsel to argue such defense to the jury (R. 42), and charged the jury, in effect, that the defense of a belief that the casings had been abandoned could not be asserted by one taking personal property from land belonging to another person (R. 47–48).

The trial judge also refused to give the following instruction requested by the defendant (R. 50):

> If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized.

The portion of the charge to the jury which gives rise to the petitioner's contention that the trial judge directed a verdict of guilty, is set forth in this brief at pp. 41–42, *infra*.

The jury having found petitioner guilty, the court sentenced him to two months' imprisonment, or to pay a fine of $200.00, together with costs (R. 51–52). The court denied petitioner's motion for a new trial (R. 53, and see Pet. 21–23), and on appeal the Court of Appeals affirmed, one judge dissenting (R. 55).

SUMMARY OF ARGUMENT

I

Both courts below correctly held that the phrase "knowingly converts to his use", as used in 18 U. S. C. 641, does not import the specific or felonious intent of common-law larceny. Both the language and its history make clear that it covers every deliberate and unjustified taking of government property. The disjunctive use of "knowingly converts", together with the normal meaning of those words, defines an offense which is committed by one who voluntarily converts to his own use personal property of the United States. The clear legislative purpose to provide greater protection for government property than is afforded by technical common-law larceny and embezzlement would be frustrated by reading into the words "knowingly converts" the element of a felonious intent, i. e., a subjective evil purpose.

II

Since the undisputed evidence was to the effect that the United States had not intended to abandon the bomb casings, the trial judge properly withheld from the jury any issue as to abandonment. Abandonment by the United States of its personal property should not be inferred from circumstances, for the same reasons which pre-

clude anyone from obtaining by adverse possession title to lands of the United States.

III

The trial judge's refusal to submit to the jury petitioner's justification or defense that he had taken the casings in the belief that they were abandoned was correct in that, by analogy to the law of finders, the petitioner was under a duty to inquire whether the United States as the known owner of the land had abandoned the casings. Failure to inquire under these circumstances would preclude such a defense even under a charge of common-law larceny (with its requirement of felonious intent) and does so, *a fortiori*, where the charge is under Section 641.

IV

Since a charge of "knowingly" converting to one's own use under Section 641 does not require proof of the felonious intent which is an ingredient of larceny, the petitioner was not entitled to an instruction that his taking of the casings was so open and notorious and accompanied by such a bona fide claim of title or right as to create a "strong presumption" that the taking was without "felonious intent". In view of his failure to inquire of the known owner as to whether the casings had been abandoned, the taking, even if sufficiently open and notorious, was not accom-

panied by such a claim of right made in good faith as would justify such an instruction even under a charge of common-law larceny.

V

In instructing the jury that if they believed either petitioner's or the government's versions of the facts, they should find the petitioner guilty, the trial judge was not usurping the jury's function. In effect, he told them that the admitted facts constituted a violation of Section 641, but this was not reversible error since he also instructed them that theirs was the power to determine the petitioner's innocence or guilt.

ARGUMENT

I

THE COURT BELOW CORRECTLY REFUSED TO READ INTO "KNOWINGLY CONVERTS", AS USED IN 18 U. S. C. 641, THE INTENT REQUIREMENTS OF COMMON LAW LARCENY

As to the mental state or intent necessary to constitute an offense under 18 U. S. C. 641, the trial judge charged the jury that "The question on intent is whether or not he intended to take the property" (R. 49). At the same time, he refused to give the petitioner's requested instruction that "Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty" (R. 50). The

petitioner asserts error in this charge and in the refusal to charge on the ground that felonious intent, or a subjective evil purpose, is an essential ingredient of the crime with which he was charged under Section 641. Specifically he contends that such an element of felonious intent must be read into the words "knowingly converts to his use or the use of another [property of the United States]" (Pet. br. 17, *et seq.*).[2] We contend, to the contrary, that the charge was correct in that "knowingly converts" requires only proof that the petitioner deliberately and without justification converted to his own use personal property which he knew belonged to the United States.

In effect, petitioner is contending that in 18 U. S. C. 641 the words "embezzles, steals, purloins, or knowingly converts to his use or the use of another," embrace only the common law crimes of embezzlement and larceny. This view was accepted by the dissenting judge below (R. 74–77), who concluded that "the offenses of stealing and purloining property and knowingly con-

[2] The indictment charged that the petitioner "did unlawfully, wilfully and knowingly steal and convert to his own use" etc. Thus, the indictment charged in the conjunctive offenses which, as we will show, the statute defines disjunctively; it is well established that if the evidence supports any one of the offenses thus charged, a conviction will be upheld. *Troutman* v. *United States*, 100 F. 2d 628 (C. A. 10); *United States* v. *Lutz*, 142 F. 2d 985 (C. A. 3); *Pines* v. *United States*, 123 F. 2d 825 (C. A. 8).

verting it to one's use, made punishable by the criminal statute in this case, are all equivalent to common law larceny" (R. 77).

We contend that the court below correctly affirmed the trial judge in his refusal to charge the jury that felonious intent is an essential element of the statutory crime of knowingly converting government property to one's own use. We believe that 18 U. S. C. 641 is not limited to the common law crimes of embezzlement and larceny, but defines as separate and distinct crimes stealing, purloining and the knowing conversion of government property to one's own use, and that whatever may be the precise meaning of "steal" and "purloin" as used in the statute, there is no basis for equating "knowingly converts" to larceny by importing a requirement of felonious intent. The construction of the courts below is compelled by (1) the literal language and disjunctive structure of Section 641, (2) the language and history of statutes from which Section 641 was derived, and (3) the modern tendency to abandon the highly technical aspects of the common law concept of larceny.

1. Section 641 applies to "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another" property of the United States. The disjunctive use of the words "embezzles", "steals", "purloins", "or knowingly converts" alone suggests, as the court below held

(R. 59), "that Congress has, in a single paragraph, defined separate and distinct crimes involving different elements." Moreover, the second paragraph of Section 641 applies to "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined *or converted*" (emphasis supplied); this repeated use of the disjunctive is strong evidence that it was deliberate. Cf. *Dennis* v. *United States*, 341 U. S. 494, 499.

The natural reading of Section 641 is that in addition to whatever offenses are embraced in the words "embezzles, steals, purloins", Congress has created a separate offense consisting of the knowing conversion of government property to one's own use or to the use of another. Thus, even assuming (what we will show to be incorrect) that "steals" and "purloins" embody only the common law conception of larceny requiring a specific criminal intent or purpose, the following phrase, "or knowingly converts to his own use", would be rendered entirely superfluous by reading into it, as petitioner urges, an element of felonious intent which would equate it to larceny.

It is well established that the use of the word "knowingly" in a criminal statute does not necessarily import into it the element of felonious intent, *i. e.*, a conscious purpose to commit the

crime.[3] "Knowingly" is construed normally as requiring only that a person deliberately perform the prohibited act without justification or excuse, his intention to do that act constituting a sufficient criminal intent. *Rosen* v. *United States*, 161 U. S. 29. It is true that a requirement of a specific criminal intent or purpose has been read into "knowingly" in cases where the prohibited transportation or manufacture related to articles which have both innocent and unlawful uses, thus making the purpose of such transportation or manufacture a necessary and decisive element. *Davis* v. *United States*, 62 F. 2d 473, 474 (C. A. 6); *Nosowitz* v. *United States*, 282 Fed. 575 (C. A. 2). Similarly, it would seem that a stricter requirement of intent could be derived from "knowingly", as it was derived from "wilfully" in *Screws* v. *United States*, 325 U. S. 91, if necessary to save a statute from vagueness. Where, as here, such circumstances are absent, "knowingly" should be given its usual meaning unless it appears that only a construction requiring a felonious or specific criminal intent will comport with the legislative purpose underlying Section 641. We show below that such is not the case here.

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[3] Even such terms as "wilfully" and "knowingly and wilfully" are not interpreted as requiring such a specific criminal intent where the context indicates that such a reading would defeat the clear legislative purpose. *Browder* v. *United States*, 312 U. S. 335, 340–342; *Fields* v. *United States*, 164 F. 2d 97, 99–100 (C. A. D. C.), certiorari denied, 332 U. S. 851.

2. Section 641 was derived in the revision of 1948 from the following statutes:

a) 18 U. S. C. 82—"Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin * * * any property of the United States * * *."

b) 18 U. S. C. 87—"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, * * * or other property furnished or to be used for the military or navy service * * *."

c) 18 U. S. C. 100—"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States * * *."

d) 18 U. S. C. 101—"Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined * * *."

The Reviser's Notes to Section 641 state that it is a consolidation of 18 U. S. C. 82, 87, 100 and 101.

In the absence of evidence to the contrary, it is to be presumed that the words and phrases selected for consolidation were taken with their meaning as established by judicial decisions. Thus, it had been held in *Crabb* v. *Zerbst*, 99 F. 2d 562 (C. A. 5), that "steal" as used in 18 U. S. C. 100 is broader than common law larceny. In comparing the former 18 U. S. C. 99 and 100 (Sections 46 and 47 of the old Criminal Code) the Fifth Circuit said (99 F. 2d at 564–565):

> As pointed out above, the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice. In some of these statutes the offense is denominated "theft" or "stealing." No statute offers a clearer example of compromise between the common law and the modern code than the two sections here involved. Section 46 deals with robbery and larceny, the description of the latter being taken from the common law. Section 47 denounces the related offenses which might be included with those described in section 46 under a code practice seeking to avoid the pitfalls of technical pleading. In it the offense of embezzlement is included by name, without definition. Then to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under

the common law, it adds the words *steal or purloin*. That dictionaries use these words in defining larceny, and each of them in defining the other, does not prove that they are synonymous. Larceny is hedged about by its common-law definition. Embezzlement must be considered to have its classical meaning and to stand at the opposite extreme of the offenses dealt with in these two sections. Between them there lies a gap which has grown wider and wider as the multifarious activities of the central government have spread and increased. Stealing, having no common-law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word *purloin*. We do not intend to delineate the differences in meaning of these words. It is sufficient for this case to say that there are shades of difference in meaning, and that Congress used them with these differences in view.

Similarly, in *United States* v. *Handler*, 142 F. 2d 351, 353 (C. A. 2), certiorari denied, 323 U. S. 741, it was noted that "in various federal statutes the word 'stolen' or 'steal' has been given a meaning broader than larceny at common law." In that case, it was held that by the use of those words "the National Stolen

Property Act was not restricted to the transportation of property taken larcenously. * * * In our opinion the statute is applicable to any taking whereby a person dishonestly obtains goods or securities belonging to another with the intent to deprive the owner of the rights and benefit of ownership." Also, in *United States* v. *DeNormand*, 149 F. 2d 622 (C. A. 2), certiorari denied, 326 U. S. 756, rehearing denied, 326 U. S. 808, 811, 327 U. S. 816; certiorari denied, 330 U. S. 822, rehearing denied, 330 U. S. 854, it was said that "steals" as used in what is now 18 U. S. Code 659 has a broader scope than common law larceny; it was held therefore, that the asportation which was an essential ingredient of larceny need not be proved under a charge of stealing. Contra, *United States* v. *Cohen*, 274 Fed. 596, 597 (C. A. 3).[4]

The phrase "knowingly converts to his use" as employed in Section 641 was derived from the phrase "Whoever shall steal, embezzle, or knowingly apply to his own use" in the former 18 U. S. C. 87. That statute originated in the Act of March 2, 1863 (12 Stat. 696), which, while dealing largely with fraud, also penalized

[4] The lower federal courts are divided as to whether "stolen" as used in the National Motor Vehicle Theft Act has a broader meaning than "larceny." Compare, e. g., *United States* v. *Adcock*, 49 F. Supp. 351 (W. D. Ky.), with *Hite* v. *United States*, 168 F. 2d 973 (C. A. 10). The question in these and similar cases is whether "stolen" includes automobiles as to which both possession and title were obtained by fraudulent means, as by giving a bad check to the owner.

"any person in said [armed] forces or service who shall *steal, embezzle, or knowingly and willfully misappropriate or apply to his own use or benefit,* or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States" etc. (italics supplied). The legislative history of the original statute supports only the general conclusion that Congress, indignant over large-scale frauds and depredations in the supplying of the Northern armies, enacted this statute to protect the government's military stores.[5] It is fair to assume that the wartime 38th Congress was not concerned with perpetuating the common-law niceties of larceny. In the 1874 revision of the statutes (Rev. Stat. 5439), the phrase in question was changed to read "knowingly applies to his own use." No reason was given for the deletion of "willfully."

Under the earlier statute, the words "knowingly apply to his own use" always were given a meaning disjunctive to that of the preceding words, "steal" and "embezzle." *Horowitz* v. *United States,* 262 Fed. 48, 50 (C. A. 2), certiorari denied, 252 U. S. 586; *Adolfson* v. *United States,* 159 F. 2d 883, certiorari denied, 331 U. S. 818. In the *Adolfson* case, the Ninth Circuit rejected a contention that

[5] 63 Cong. Globe 952 *et seq.*

"to knowingly apply to his own use" is the equivalent of "embezzle," as follows (at 885):

> * * * His argument is that section 87 "is purely an embezzlement statute" (referring to its title); that the indictment charges embezzlement and nothing more and that to "apply the property of another to one's own use" is to embezzle it. The simple language of section 87 refutes that argument for it covers several specifically named offenses wholly apart and divorced from the technical offense of embezzlement. One of these specifically and separately named offenses is that of knowingly applying to one's own use property "furnished or to be used for the military or naval service." The prohibition against knowingly applying Government property appears in the text of section 87 after the word "or" which follows the reference to the offense of embezzlement. The use of the word "or" clearly indicates alternative circumstances * * * and was obviously intended to identify and define a wholly separate and distinct offense, and we so hold. Appellant would have us read out of section 87 a meaning, a purpose, a definition and a protection of public property which to us clearly appears to speak the plain intent of the lawmakers.

Again it will be noted that the former 18 U. S. C. 99 applied to "Whoever shall rob another of any kind or description of personal

property belonging to the United States, *or shall feloniously take and carry away the same* * * *" (italics supplied). In the revision of 1948, the prohibition of robbery was transferred to the present Section 2112, while the phrase "feloniously take and carry away," which had been construed as meaning common law larceny in *Crabb* v. *Zerbst, supra,* p. 19, was "omitted as covered by section 641 of this title" (Reviser's Notes to Section 2112).

In brief, the present Section 641 was drafted with full knowledge as to what language would be construed to cover only common law larceny, with the knowledge that the words "steal" and "purloin" had been construed as having a broader coverage than larceny, and with the knowledge that the disjunctive use of "knowingly converts to his use" would be interpreted literally as defining a crime in addition to stealing and embezzlement. Thus, there is no basis for concluding that Congress intended in Section 641 to prohibit only common-law larceny and embezzlement of government property. The number and varied language of the statutes codified into Section 641 make it clear that that section as a whole should be interpreted to apply to any person who deliberately and without justification deprives the United States of the use of its personal property for the benefit of himself or some other person.

Moreover, the words "knowingly converts" on their face indicate a legislative purpose to pro-

scribe as a crime what would otherwise constitute merely the tort of conversion. It would seem that the phrases "misappropriate or apply to his own use", "apply to his own use" and "knowingly converts to his use", as variously used since 1863, are equivalent, and that all invoke the concept of conversion as developed in the law of torts and bailments, rather than the criminal law's refined concept of larceny. See, *e. g.*, Story's *Commentaries on the Law of Bailments* (7th ed. 1863) sections 85–87. Obviously, taking and selling the personal property of the United States constitutes a conversion (1 *Restatement of Torts*, secs. 223, 236), and the criminal offense defined in Section 641 is committed if the taker knows or has reason to know that the property belongs to the United States.

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[8] 18 U. S. C. 654 employs the words "embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee,". "Wrongfully converts" as there used has been construed as practically equivalent to embezzlement. *Hubbard* v. *United States*, 79 F. 2d 850 (C. A. 9). 18 U. S. C. 656 contains the verbs "embezzles, abstracts, purloins or willfully misapplies any of the moneys * * * [of banks]." This Court has stated, in *United States* v. *Britton*, 107 U. S. 655, 669, that, "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning like the word 'embezzle' as used in the statutes, or the words "steal, take and carry away," as used at common law."

3. Such a literal construction of Section 641, which ascribes to the disjunctive words "knowingly converts to his use" the definition of a crime in addition to common law larceny and embezzlement, is consistent with the modern statutory development in this class of offenses. Historically, the harsh penalties applied to larceny impelled English judges to give larceny a strict and technical definition in terms of intent, asportation, and method of obtaining possession, which left outside its scope many deliberate interferences with the possession and enjoyment of property. With the development of a more humane penology, no such reason remains for reading into modern statutes for the protection of property the technical requirements of common law larceny (or embezzlement). The enormous variety and volume of Government-owned personal property, stored under many different conditions throughout the country, and under the management of thousands of employees, present problems of protection and preservation unknown to any private owner. Clearly, it was these factors that impelled Congress, in enacting the variety of statutes which were codified into Section 641, to provide more protection for property of the Federal Government than is afforded by the common law concepts of larceny and embezzle-

ment. Indeed, Congress could make criminal the conversion of government property without any element of knowledge or scienter. *United States* v. *Balint*, 258 U. S. 250; *United States* v. *Behrman*, 258 U. S. 280. In view of the continued effort of Congress to provide greater protection for government property, restriction of the application of the statute to one who "knowingly converts to his use," can mean only that he must have knowledge of the Government's ownership of the property involved, not that the statute must be equated to technical common law larceny and embezzlement.

In the present case, the petitioner admitted that he took and sold the bomb casings without inquiry. He knew that they had belonged to the United States, but he asserts (1) that the casings had been abandoned, and (2) that in any event he was justified in believing that the casings had been abandoned. Accordingly, he contends that both of these issues should have been submitted to the jury. If, as we contend, neither of these defenses was legally and factually sufficient, then, on his own admission, he possessed such knowledge of the Government's ownership of the casings as to subject him to prosecution as one who "knowingly converts to his use" property of the United States.

II

THE TRIAL JUDGE PROPERLY REFUSED TO SUBMIT TO THE JURY THE QUESTION OF WHETHER THE UNITED STATES HAD IN FACT ABANDONED THE BOMB CASINGS.

The petitioner seems to contend (Pet. 3, Br. 32) that the trial court erred in not allowing the jury to determine whether the United States had in fact abandoned the bomb casings. We contend to the contrary, not only that there was no evidence of intent by the Government to abandon its property, so as to permit the issue of actual abandonment to go to the jury, but also that as a matter of law abandonment of property by the United States cannot be inferred.

1. To establish abandonment, it is necessary to show both acts indicating physical abandonment and an actual intent to abandon. *Baglin* v. *Cusenier Co.*, 221 U. S. 580, 597–598; *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19, 31; *Helvering* v. *Jones*, 120 F. 2d 828, 830 (C. A. 8); *Carter Oil Co.* v. *Mitchell*, 100 F. 2d 945, 951–952 (C. A. 10); *International Finance Corporation* v. *Jawish*, 71 F. 2d 985, 986 (C. A. D. C.). Assuming, *arguendo*, that the location and condition of the casings constituted circumstances indicating the ex-

ternal act of abandonment,[7] the petitioner in no way met the Government's undisputed evidence that there was no intent to abandon the casings. Thus, the commanding officer of the Oscoda Air Base testified that he had no authority to dispose of the casings (R. 8). Moreover, another witness testified that the Oscoda Chamber of Commerce and Agriculture had been unable to obtain permission to take the casings for its scrap drive (R. 5).[8] In view of this evidence to the

[7] We do not concede that the location and condition of the casings constitutes any evidence of an external act of abandonment. The photographic exhibits filed with the Court establish only the conceded fact that the casings were scrap metal. Steel scrap is a commodity for which there is an established market. For example, the prevailing price for the basic grade of steel scrap delivered at Pittsburgh on December 1, 1948, was $49.00 per ton. *N. Y. Times*, December 2, 1948. The fact that the Government or any other landowner leaves steel scrap lying about for a long period of time simply reflects the economics of the industry. "The principal suppliers of ferrous scrap purchased by domestic steel mills are the railroads, the automotive industry, and other large industrial steel consumers." "When the demand and price are sufficiently strong, it is profitable to collect scrap in smaller communities and at points farther from domestic consuming centers or ports of export, even though such movements involve substantial transportation costs." "Some areas remote from the large steel plants are drawn upon only when prices become sufficiently high to cover costs of collecting, sorting, and transporting to consuming centers, and to leave a reasonable margin of profit." *Iron and Steel*, U. S. Tariff Commission Report No. 128, 2d Series (1938) pp. 320, 322, 125.

[8] The Department of the Air Force has advised us that it sells as scrap metal the used practice bomb casings accumulated on its bombing ranges.

effect that there was no intent to abandon the bomb casings and the total lack of evidence to prove such an intent, the trial judge correctly refused to permit the jury to speculate as to whether the casings had in fact been abandoned. *Kister Oil Development Corp.* v. *Young,* 27 F. 2d 433, 437 (W. D. Ky.); *Wilmore Coal Co.* v. *Brown,* 147 Fed. 931, 943 (C. C. W. D. Pa.); *Paine* v. *Griffiths.* 86 Fed. 452, 456 (C. A. 3); *Ferguson* v. *Ray,* 44 Ore. 557, 567; *Worsham* v. *State,* 56 Tex. Crim. 253, 260.

2. Also, we believe that abandonment of personal property by the United States cannot be inferred from circumstances, as it may be in the case of private owners. Such a conclusion would seem to be a necessary corollary to the established rule that title to land cannot be acquired by prescription or adverse possession against the United States. *United States* v. *California,* 332 U. S. 19, 39–40. Loss of ownership of personal property by abandonment is comparable to the loss of ownership of real property through adverse possession. A claim of abandonment by the United States, like a claim based upon adverse possession, is inconsistent with the exclusive power of Congress to dispose of the property of the United States. *Jourdan* v. *Barrett,* 4 How. 168, 184, and with the related principle that the United States cannot be deprived of its property rights through the action or inaction of its officers. *United States* v. *California, supra.*

We believe, therefore, that it would have been error for the trial judge to have permitted the jury to find actual abandonment of the bomb casings by the United States, except in accordance with procedures authorized by Congress.[9]

III

THE TRIAL JUDGE PROPERLY REFUSED TO SUBMIT TO THE JURY THE PETITIONER'S DEFENSE THAT HE BELIEVED THE BOMB CASINGS HAD BEEN ABANDONED

The petitioner's principal attack upon his conviction is that the trial judge refused to charge the jury, and refused to permit the petitioner's counsel to argue to the jury, that if they found that the petitioner had believed that the casings had been abandoned (as distinguished from actual abandonment), they should acquit him. The requested charge was as follows (R. 50):

> The question is: What was in Mr. Morissette's mind at the time he took it?

[9] Pursuant to Sections 2 and 14 of the Surplus Property Act of 1944 (50 U. S. C. App. 1611, 1623) the Department of the Air Force, as the owning agency was empowered to dispose of scrap materials, subject to any regulations which might be promulgated by the Surplus Property Administrator (later, the War Assets Administrator). By regulations which became effective September 1, 1948, disposal agencies, such as the Department of the Air Force with respect to its scrap materials, were empowered to abandon or destroy personal property upon written findings "by a responsible officer, approved by a reviewing authority." 44 C. F. R. 402.18. No such procedure was followed with respect to the bomb casings here involved.

> Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.
>
> Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

We submit that the trial judge correctly refused so to charge the jury.

While petitioner testified that he thought that the casings had been abandoned, he also testified that he knew that the casings were on government land. (R. 35.) He did not even claim that he had made any inquiry at the Air Base as to whether the casings had been abandoned. Thus, petitioner's position is that he can justify the taking of personal property from the owner's land by saying that he thought such property was abandoned—even though he made no inquiry of the known owner as to whether it actually had been.

No cases have been found in which it was sought to defend a charge of larceny or, as here, statutory conversion, upon the ground that the defendant mistakenly believed that chattels lying upon another man's land had been abandoned. However, a persuasive analogy is found in the law of larceny as applied to finders. It has long been the law both in England and in the United

States that a finder of chattels who does not make a reasonable effort to discover the true owner is guilty of larceny. Thus, in *Regina* v. *Reed*, 1 Car. & M. 306 (1842) where a charge of larceny was based upon finding money in the street, Justice Coleridge stated (p. 307) that:

> If the circumstances under which property is found to be such that the ownership has been abandoned, the thing is bonum vacans, and any one may take it; but if the ownership be not abandoned, the thing is not the property of the finder: if, in addition to this, the person who finds it shows no intention to find out the owner, or to return it, that person is guilty of larceny.

In *Regina* v. *Peters*, 1 Car. & K. 245 (1843), involving a conviction for larceny of a finder of jewelry, Baron Rolfe declared (p. 247) that:

> If a man is possessed of a chattel, he does not lose the property in it because he places or drops it in a field. Nay, if he drop it in a street, it still remains his property. The only case where a party can be justified in converting it to his own use is, where it has fallen or dropped where a party may fairly say the owner has abandoned it; or if the party cannot be found to whom it belonged. If I had an apple, and dropped it, it might be presumed that I abandoned it; but if I drop £500, the presumption is, that I do not mean to abandon it. If I drop a thing where there is no reasonable means of finding out that it belongs to me, then,

> though I am found out to be the owner, the party finding it would not be guilty of felony, if he converted it to his own use; though he would be liable to an action of trover. But it is perfectly well known that, if a person leave any thing in a stage-coach, if the owner can be found by inquiry, the party finding the thing, and appropriating it to his own use, is guilty of larceny. So, if it is found in a street, and there is any mark by which the owner can be discovered. So, in the case where a gold ornament is found at the door of a house, it is ridiculous to say that any person picking it up would not suppose that it belonged to the owner of the house.

Accord, *Regina* v. *Coffin,* 2 Cox. C. C. 44 (1846) (finder of money in a theatre).

In the United States, it is generally held that a finder of lost property will be guilty of theft or larceny where the surrounding circumstances give him knowledge or means of inquiry as to the true owner. *Griggs* v. *State,* 58 Ala. 425; *People* v. *Waggoner,* 388 Ill. 468, 58 N. E. 2d 533; *Perdew* v. *Commonwealth,* 260 Ky. 638, 86 S. W. 2d 534. In such states as New York, California and Oklahoma, the rule is established by statute.[10] A Michigan

[10] New York Penal Code, section 1300; California Penal Code, section 485; 21 Oklahoma Statutes Ann., section 1702. The New York statute, which is typical, is as follows:

> A person, who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his

statute requires a finder to search for the true owner by advertising in newspapers.[11] Under the Michigan statute, it was held that one who found goods on land which he had leased was not excused from this duty to seek out the owner. *People* v. *Harmon*, 217 Mich. 11, 185 N. W. 679.[12]

The dissenting judge below cited *Johnson* v. *State*, 36 Tex. 375, and *Jordan* v. *State*, 107 Tex. Cr. 414, 296 S. W. 585, for the proposition that "where one takes personal property into his possession in the honest belief that it is abandoned by its owner, he is not guilty of larceny" (R. 83). However, *Johnson* v. *State*, *supra*, involved a clear case of property which had been actually abandoned (a pony on open range for years with no known owner). In *Jordan* v. *State*, *supra*, it was held that the issue of the defendant's belief that the property had been abandoned should have been submitted to the jury. There the defendant had taken for his own use parts of an automobile which had been burned, left alongside the road, later pushed into a nearby creek, and partially stripped of parts by other persons. The case does not discuss whether one believing prop-

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own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny.

[11] Michigan Statutes Ann., section 18.702.

[12] See, generally, Riesman, *Possession and the Law of Finders*, 52 Harv. L. R. 1105, 1130–1133 (1939).

erty to be abandoned is under the duty to make inquiry which is imposed upon a finder. Moreover, on its facts, the case is far from authority for the proposition urged by petitioner that A taking goods from land which he knew belonged to B can defend on the ground that he thought B had abandoned the goods.

We believe that the finding and abandonment situations are so similar that the same principles should govern both. When Congress proscribes as a crime conduct which includes larceny, the Federal courts may properly give effect to such a universally concomitant common law principle as the duty of inquiry placed upon finders. *Jerome* v. *United States*, 318 U. S. 101, 108. As to finders, the law is well established that they must utilize such knowledge and avenues of inquiry as to the true owner as are provided by the surrounding circumstances—such as the place of finding. The purpose of this rule is to protect the rights of true owners as far as possible. Similarly, before one can defend a taking of property on the ground that he thought it was abandoned, he should be required to show that he took advantage of the knowledge afforded by the circumstances to ascertain whether the property was in fact abandoned. Specifically, before one can be heard to say that he thought chattels upon the land of a known owner were abandoned, he

must show at the very least that he attempted to communicate with the land owner The fact that the chattels are on the land of a known owner gives the same notice of probable or possible ownership as does a name card in a wallet found on the street.[13]

Since the petitioner here admittedly knew that the United States owned (or had leased) the land on which the casings were located, and since he did not even claim that he had inquired as to whether the casings were actually abandoned, his defense of a belief that they had been abandoned was legally insufficient. Since his defense was insufficient as a matter of law, the trial judge properly refused to submit it to the jury. Stated otherwise, absent any evidence that petitioner had inquired as to whether the United States had abandoned the casings, his defense of a belief in abandonment was properly withheld from the jury. *Rosen* v. *United States,* 161 U. S. 29, 41; *Agnew* v. *United States,* 165 U. S. 36, 53–54; *Cantwell* v. *United States,* 81 F. 2d 31 (C. A. 9); *Bloch*

[13] While the English courts have not had occasion to consider the precise question here involved, they have in general refused to recognize claims to lost or abandoned chattels asserted by trespassers on the land upon which the chattels were lost or abandoned. A recent case is *Hibbert* v. *McKiernan* [1948] 2 K. B. 142, upholding a conviction for theft where the defendant, a trespasser, had picked up from a club golf course balls which had been lost and abandoned by club members.

United States, 158 F. 2d 519 (C. A. 5), certiorari denied, 330 U. S. 837. The last two cited cases hold that in the absence of evidence of entrapment a trial judge should keep the issue of entrapment from the jury. Similarly, the trial judge properly refused to permit the petitioner's counsel to argue to the jury the defense of belief of abandonment which was legally insufficient under the evidence for the reasons stated above. *Hill* v. *United States*, 22 App. D. C. 395; *Henry* v. *United States*, 273 Fed. 330 (C. A. D. C.), certiorari denied, 257 U. S. 640; American Law Institute, *Code of Criminal Procedure* (1930) Section 322. Thus, in the *Hill* case, the defendant's counsel was not allowed to argue the defense of insanity to the jury, where no evidence had been introduced on that issue.

It is to be noted that under this analogy to the law of finders the petitioner's defense that he believed the casings to be abandoned property would be legally insufficient even against a charge of common law larceny with its requirement of felonious intent which petitioner would read into Section 641. Under a charge of knowing conversion to his own use, under which felonious intent need not be proved, the defense is insufficient *a fortiori*.

IV

THE TRIAL JUDGE CORRECTLY REFUSED TO INSTRUCT THE JURY THAT AN OPEN AND NOTORIOUS TAKING WOULD CREATE A "STRONG PRESUMPTION" THAT THE PETITIONER LACKED A FELONIOUS INTENT.

At the trial, the trial judge refused to give the following charge as requested by the petitioner (R. 50):

> If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized.

The requested charge was properly refused for several reasons.

First, "felonious intent" is not an element of "knowingly converts to his own use," the charge upon which the petitioner was convicted. The decisions which hold that such an instruction should be given are based upon a distinction between larceny and trespass or forcible trespass. *McMullen* v. *State*, 53 Ala. 531; *Lawson* v. *State*, 161 Miss. 719, 138 So. 361; *State* v. *Coy*, 119 N. C. 901, 26 S. E. 120. This distinction partly reflects the common law rule that a taking of personal property followed by a conversion to the taker's use does not constitute larceny unless the taking was accompanied by an intent to deprive the owner of his property. However, we

have seen that Section 641 covers not only common-law larceny but also any deliberate conversion of government property.

Moreover, the decisions make it clear that an open and notorious taking will support an inference of lack of felonious intent only when such a taking is accomplished by a claim of title or right made in good faith in the presence of the owner or other persons. *People* v. *Jones*, 61 Cal. App. 2d 608, 143 P. 2d 726, appeal dismissed, 323 U. S. 665; *State* v. *Williams*, 163 Wash. 419, 1 P. 2d 307; reheard, 166 Wash. 704, 8 P. 2d 1118. The purpose of these limitations is to minimize the opportunity for the fabrication of evidence of innocence, opportunity which is inherently absent where the conduct involved, such as flight, indicates guilt. Wigmore, *Evidence* (3d ed.), sec. 293. Even under a charge of larceny, no such inference of good faith could be drawn in this case if, as we contend, the petitioner was under a duty to inquire of the known owner whether the casings had actually been abandoned. Nor could such an inference be drawn if, as we believe, no one can be heard to say that he believed that the United States had abandoned its property. Also, it seems clear that even under a charge of larceny, the petitioner's taking of the casings was neither so open, nor accompanied by such a public claim of title or right, as to justify his requested instruction that there existed a "strong presumption" that he lacked a "felonious intent."

V

THE TRIAL JUDGE DID NOT INVADE THE PROVINCE OF THE JURY

The petitioner's final contention is that the trial judge, by his charge to the jury, practically directed a verdict of guilty and thus usurped the jury's function. The pertinent portion of the charge reads as follows (R. 48–49):

> I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty.
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> * * * * *

> The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.

We believe that the charge was unobjectionable or, at the most, involves only harmless error, as the court below held (R. 62).

The petitioner had testified that he had taken the casings from land which he knew belonged to the United States without making any inquiry as to whether the casings had been abandoned. If, as we contend, felonious intent was not an element of the crime with which petitioner was charged, and if his asserted belief of abandonment was a legally insufficient defense, the trial judge correctly instructed the jury that the undisputed facts constituted a knowing conversion of government property in violation of Section 641. Here, as in *Horning* v. *District of Columbia,* 254 U. S. 135, under the undisputed and admitted facts the petitioner's voluntary acts amounted to the commission of the offense charged. In that case, the trial judge not only told the jury that the admitted facts constituted an offense, but added that a failure to bring in a verdict could only arise from a flagrant disregard of the evidence, the law, and their obligation as jurors. Obviously, the trial judge in this case did not go nearly as far as in *Horning,* and in addition he took pains to inform the jury

that "You can go up there and come down and say not guilty * * * because you are the judges of the facts" (R. 48). The instant case is clearly unlike *Murdock* v. *United States,* 290 U. S. 389, 394–398, where it was held that since the offense there charged required the jury to find a specific criminal intent or bad purpose, undisputed evidence as to the defendants voluntary acts did not permit the trial judge to express such an opinion as was upheld in *Horning.* Neither does the instant case resemble *Billeci* v. *United States,* 184 F. 2d 394, 401 (C. A. D. C.) in which the *Horning* rule was held to be inapplicable to "a case in which all the evidence is given by witnesses presented by the Government but the defense does not concede that the essential evidence is true." Here, the facts as testified to by the petitioner constitute the offense of knowingly converting to his own use property of the United States, and the trial judge merely so advised the jury, leaving them free to render any verdict they chose.

At the most, as in *Horning* v. *District of Columbia,* 254 U. S. 135, 138–139, "Perhaps there was a regrettable peremptoriness of tone—but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it

was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt."

As the court below concluded (R. 62): "To reverse and remand for a new trial because of the expressions of the district judge in his charge would be to ignore the spirit as well as the letter of Rule 52 (a) of the Federal Rules of Criminal Procedure respecting harmless error. That rule provides: 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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